TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922.

No. [redacted] 316.

THE PEOPLE OF THE STATE OF NEW YORK, ON THE RELATION OF [redacted] CLYDE, PLAINTIFF IN ERROR,

vs.

[redacted] AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

(28,802)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 847.

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF EMELINE F. CLYDE, PLAINTIFF IN ERROR,

vs.

JAMES A. WENDELL, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Record on appeal to the court of appeals	1	1
Petition for writ of certiorari with waiver and consent	2	1
Order allowing writ of certiorari in New York supreme court	6	3
Writ of certiorari	7	4
Return to writ of certiorari	9	5
Exhibits—Rider to income tax return for 1919	10	5
Letter to Mrs. E. F. Clyde, November 22, 1920	11	6
Answer to income tax bureau, November 26, 1920	12	7
Letter to Wm. P. Clyde, December 16, 1920	13	7

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 20, 1922.

		Original.	Print.
Exhibits	Notice of additional assessment of income tax...	14	9
	Decision of comptroller.....	16	10
	Order confirming decision of comptroller.....	18	10
	Notice of appeal.....	19	11
Remittitur from court of appeals.....		20	12
Order on remittitur.....		23	13
Judgment on remittitur.....		25	14
Petition for writ of error.....		27	15
Assignment of errors.....		35	19
Order allowing writ of error and fixing bond.....		39	22
Writ of error.....		41	22
Citation and service.....		43	23
Bond on writ of error.....		44	24
Præcipe for transcript.....		47	25
Clerk's certificate.....		50	26

1 TRANSCRIPT OF RECORD.

Supreme Court of the United States, October Term, 1921.

No. —.

THE PEOPLE OF THE STATE OF NEW YORK on Relation of EMELINE F. CLYDE, Relator in Error,

against

JAMES A. WENDELL, as Comptroller of the State of New York, Respondent in Error.

In Error to the Supreme Court of the State of New York.

2 *Petition for Writ of Certiorari, with Waiver and Consent.*

Supreme Court, Albany County.

In the Matter of the Application of EMELINE F. CLYDE for a Writ of Certiorari to James A. Wendell, as Comptroller of the State of New York.

To the Supreme Court of the State of New York:

The petition of Emeline F. Clyde respectfully shows:

(1) On or about the 12th day of March, 1920, petitioner filed with the Comptroller of the State of New York a return of her income for the taxable year 1919 as required by law. Such return showed upon its face that petitioner had received certain amounts of income from bonds secured by mortgages recorded in the State of New York with respect to which the mortgage recording tax had been paid in accordance with the provisions of Article XI of the Tax Law of the State of New York, such income amounting to the sum of $26,458.34, and also certain income from secured debts as defined by the provisions of Article XIV of the Tax Law of the State of New York, as amended by Chapter 802 of the Laws of 1911 with respect to which, the tax provided by said Article as amended, had been duly paid in accordance therewith, such income amounting to $32,478.29.

(2) Thereafter, the Comptroller notified your petitioner that upon the audit of said return, the tax had been recomputed and an
3 additional tax found due with respect to the items and amounts of income above referred to, such additional tax amounting, with certain penalties and interest, to the sum of $1,336.57. The Comptroller demanded payment of such additional tax and the amount thereof was paid by your petitioner under protest and duress on the 21st day of December, 1920.

(3) On February 7, 1921, petitioner filed with the Comptroller, an application under Section 374 of the Tax Law, for the revision of her tax, alleging that the additional tax could not have been lawfully demanded and that payment had been illegally exacted from petitioner because the additional tax, including penalties and interest, was levied solely upon income received from bonds owned by petitioner secured by mortgages duly recorded in the State of New York, with respect to which the mortgage recording tax under Article XI of the Tax Law had been duly paid and upon income received from certain secured debts owned by the petitioner upon which a tax had been duly paid under the provisions of Article XIV of the Tax Law as amended by Chapter 802 of the Laws of 1911.

(4) The hearing provided for by Section 374 of the Tax Law having been waived by both parties on the ground that the facts were undisputed and that only a question of law was involved, the Comptroller thereafter and on the 8th day of February, 1921, determined that the computation of the tax against your petitioner, including said additional assessments, was correct and did not include any taxes or other charges which could not have been lawfully demanded and no payment was illegally made or exacted
4 thereupon; and that your petitioner was not entitled to any re-settlement of the computation of her tax or any readjustment of taxes, interest or penalties.

(5) Your petitioner contends and alleges that such determination is illegal, erroneous and incorrect because the additional tax, penalties and interest demanded and collected by the State herein, were based solely upon income in the amount of $26,458.34 derived from interest upon bonds upon which the mortgage recording tax under Article XI of the Tax Law had been duly paid and also upon income in the amount of $32,478.29, derived from interest upon secured debts upon which the tax had been duly paid under the provisions of Article XIV of the Tax Law as amended by Chapter 802 of the Laws of 1911, and that the income from both these sources is exempt from taxation under the Income Tax Law, such exemption having been secured for a valuable consideration, to wit, by the payment of the mortgage recording tax as to the item of $26,458.34 and by the payment of the secured debts' tax as to the item of $32,478.29.

Petitioner further alleges that the assessment and collection of the additional income tax for the year 1919, as hereinbefore set forth, violates the provisions of the Constitution of the State of New York and the provisions of the Constitution of the United States.

(6) Your petitioner being aggrieved by said determination and being desirous of reviewing the same, prays that a writ of certiorari be issued out of this Court to the Comptroller in accordance with the provisions of Section 375 and Section 199 of the Tax Law,
5 commanding him to certify and return his proceedings in this matter to the end that his said determination shall be found illegal or erroneous and that it may be revised, corrected or readjusted by the Supreme Court and for such other or further relief as may be just.

(7) Your petitioner has filed with the Comptroller an undertaking in the sum of $500.00 with sufficient sureties, duly approved by a justice of the Supreme Court as required by Section 375 of the Tax Law.

Dated February 23. 1921.

EMELINE F. CLYDE,
Petitioner.

James A. Wendell, as Comptroller of the State of New York, hereby appears in this proceeding by Charles D. Newton, Attorney General, and hereby waives verification of the foregoing petition, admits service of a copy thereof, waives notice of application for the writ of certiorari therein sought, and consents to the issuance of such writ.

Dated Albany, February 24, 1921.

CHARLES D. NEWTON,
Attorney General, for Defendant.

6 *Order for Writ of Certiorari.*

At an Adjourned Special Term of the Supreme Court Held in and for the Third Judicial District, at Albany, on the 24th day of February, 1921.

Present: Honorable Harold J. Hinman, Justice.

In the Matter of the Application of EMELINE F. CLYDE for a Writ of Certiorari to James A. Wendell, as Comptroller of the State of New York.

On reading and filing the petition of Emeline F. Clyde dated February 23, 1921, and the waivers and consent thereto annexed, and upon proof of filing with said Comptroller of an undertaking duly approved as required by Section 374 of the Tax Law;

Now on motion of Cullen & Dykman, Esqs., attorneys for the petitioner, it is

Ordered that a writ of certiorari be issued out of and under the seal of this Court as prayed for in said petition, directed to James A. Wendell as Comptroller, returnable at the office of the Clerk of the Supreme Court in and for the County of Albany, within twenty days after service thereof, to review the determination referred to in the petition herein.

Enter in Albany County.

HAROLD J. HINMAN,
Justice of the Supreme Court.

7 *Writ of Certiorari.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE

against

JAMES A. WENDELL, as Comptroller of the State of New York.

Whereas, we have been informed by the petition of Emeline F. Clyde, dated February 23, 1921, that on or about December 16, 1920, the Comptroller of the State of New York did adjust an account for income taxes for the taxable year 1919 against said petitioner under Article XVI of the Tax Law, by which account it appeared that the said taxes amounted to $1,336.57 with certain interest and penalties; that said petitioner thereafter duly filed an application under Section 374 of the Tax Law for a revision of said account; that a hearing was waived on said application; that thereafter and on the 8th day of February, 1921, Comptroller rendered his determination on said application, affirming said account and determining that the computation of the tax therein was correct and did not include any taxes or other charges which could not have been legally demanded and that no payment had been illegally made or exacted thereon, and

Whereas, it is alleged by the petitioner that in said determination injustice has been done to said petitioner, and that said de-
8 termination is erroneous, incorrect and illegal; and we being willing to consider your proceedings in the premises,

We command you to certify and return to the office of the Clerk of the County of Albany, within twenty days after the service of this writ upon you, all your proceedings and actions in the premises, and all the accounts, affidavits and evidence or other matters submitted to you or which were before you, in, of, or concerning said account for taxes or the application for revision thereof, and your decisions and determinations, that the same may be revised and corrected by this Court according to law.

Witness, Honorable Harold J. Hinman, Justice of the Supreme Court, at Albany on the 24th day of February, 1921.

L. C. WARNER,
Clerk.

The foregoing writ is allowed this 24th day of February, 1921.

HAROLD J. HINMAN,
Justice of the Supreme Court.

Service of a copy of the foregoing writ of certiorari is admitted this 24th day of February, 1921.

CHARLES D. NEWTON,
Attorney General, for Defendant.

9 *Return to Writ and Papers Annexed Thereto.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE

against

JAMES A. WENDELL, as Comptroller of the State of New York.

To the Supreme Court of the State of New York:

The respondent above named, for his return to the writ of certiorari herein, respectfully shows:

I. The allegations of paragraphs 1, 2, 3, 4 and 7 of the petition are admitted.

II. The allegations of paragraph 5 of the petition are denied.

III. Annexed hereto are copies of the following papers:

1. Rider annexed to relator's income tax return for 1919.

2. Letter to relator dated November 22, 1920, signed by Mark Graves, Director.

3. Letter to Income Tax Bureau dated November 26, 1920, signed by John Gemmill, Jr.

4. Letter to Mr. Wm. P. Clyde dated December 16, 1920, signed by E. G. Zimmer, Assistant Director.

10 5. Notice of additional assessment dated December 16, 1920.

6. Determination dated February 8, 1921.

7. Writ of Certiorari.

The papers numbered 1 to 5 above constitute the entire record upon which the determination was reached.

Witness my hand this 24th day of February, 1921.

JAMES A. WENDELL,
Comptroller,
By MARK GRAVES,
Director Income Tax Bureau.

Rider Annexed to Relator's Income Tax Return for 1919.

This return does not include income from bonds and mortgages upon property located within the State of New York upon which has been paid the recording tax and which are by reason of such payment exempt from other taxation by the State and local subdivi-

sions of the State pursuant to the provisions of Section 251 of the Tax Law.

This return does not include income upon "secured debts" exempted from all taxation in the State or any of the municipalities or local divisions of the State by payment of a tax to the State Comptroller under the provisions of Article XV of Chapter 802 of the Laws of 1911.

11 *Letter to Relator, Dated November* 22, 1920.

Copy.

November 22, 1920.

Mrs. Emeline F. Clyde,
1 W. 51st St.,
New York City.

DEAR MADAM:

Referring to your 1919 State income tax return, it is noted that under Item 8, "Non-taxable income," you report income of $14,994.60 from Liberty Loans and also income amounting to $21,250.00 without giving the source thereof. Kindly furnish this information.

It is further noted in the reconciliation of your State and Federal returns that you state that the principal difference is due to the exclusion from your State return of income from bonds on which Mortgage Recording Tax was paid and income from bonds stamped under the 1911 act. Kindly submit a detailed statement showing separately the income from bonds on which the Mortgage Recording tax was paid and income from bonds stamped under the 1911 act.

You are requested to give this matter your prompt attention. It is important that your reply be sent to this office, and that reference be made to Division 44—File 11653.

Very truly yours,

MARK GRAVES,
Director.

I. W.-M. F.

12 *Letter to Income Tax Bureau in Reply to Preceding Letter of November 26, 1920.*

Copy.

Wm. M. Clyde,
61 Broadway,
New York.

November 26th, 1920.

New York State Income Tax Bureau,
42 North Pearl Street,
Albany, N. Y.

DEAR SIRS:

I have for reply your letter of November 22nd addressed to Mrs. Emeline F. Clyde, 1 West 51st Street, under your reference No. 44—11,653.

You ask us to specify the source of $21,250 non-taxable income reported by us without showing the source from which it came. This represents interest upon $500,000 par value New York City 4½% bonds.

Income from bonds having paid the Recording Mortgage Tax of 1906 amounted to $26,458.34 and these bonds were all personally owned by the taxpayer.

As to income from bonds stamped under the Secured Debts Law of 1911, I beg to say income from this source amounted to $32,478.29 and that of this amount $2,108.34 represented income from bonds personally owned by the taxpayer and $30,369.95 from bonds held by fiduciaries, namely Brooklyn Trust Company, Trustee.

Yours very truly,
(Signed) JOHN GEMMILL, JR.,
Agent.

G./W.

13 *Letter to William P. Clyde by Assistant Director.*

Copy.

44-11653.

December 16, 1920.

Mr. Wm. P. Clyde,
61 Broadway,
New York City.

DEAR SIR:

Acknowledging your letter of November 26th, referring to the State Income Tax Return of Mrs. Emeline F. Clynde, you are advised that the only income from securities exempt from taxation un-

der the Income Tax Law because of the payment of tax on such securities is income from securities on which the investment tax was paid between September 1st, 1917 and May 14th, 1919, for the period of years for which such tax was paid.

Income from securities on which the Recording Mortgage Tax and the Secured Debts tax was paid is subject to tax under the Income Tax Law.

The following income is taxable:

Income from bonds—mortgage tax paid	$26,458.34
Income from bonds—secured debts tax paid	32,478.29
Total	$58,936.63
Net incomes should be	$64,410.54
Personal exemption	2,000.00
	$62,410.54
14 Tax on 1% on 1st $10,000.00	$100.00
" 2% " 40,000.00	800.00
" 2% " 12,410.54	372.31
	$1,272.31
Tax paid	34.74
Tax due	$1,237.57

Additional assessment notice enclosed.

Very truly yours,

MARK GRAVES,
Director,

By E. G. ZIMMER,
Assistant Director, Chief Audit Division.

H. V. D./M. A. E.

1-Enc.

Notice of Additional Assessment.

Form No. 321.

No. 15148.

New York State Income Tax.

New York State Income Tax Bureau.

Notice of Additional Assessment of Income Tax.

Original. Receiving Stamp.

Date, Dec. 16, 1920. No. —.

Against—

Mrs. Emeline F. Clyde,
1 West 51st St.,
New York City:

You may keep this notice.

Payment must be made within ten days from date of this notice, to avoid additional penalties imposed by law.

The audit of your State income tax return for 1919 discloses additional tax due from you as stated below:

Explanation.	Amount of tax due.
Additional tax due as per accompanying letter.....	$1,237.57
Interest at 1% a month from May, 1920, to January 10, 1921—8%	99.00
Total	$1,336.57

This tax is subject to additional interest and penalties, as follows: 1% for each month or fraction of a month to date of payment, if not paid within ten days.

The foregoing tax is hereby assessed as indicated herein.

EUGENE M. TRAVIS,
Comptroller.

H. V. D./M. A. E.

Payment may be made at any office of the New York State Income Tax Bureau.

Make checks payable to Comptroller of the State of New York.

16 *Determination of the Comptroller.*

STATE OF NEW YORK:

Office of the Comptroller,

Income Tax Bureau, Albany.

In the Matter of the Income Tax Assessed for the year 1919 against EMELINE F. CLYDE.

The taxpayer above named having filed on or before March 12, 1920, a return of her taxable income for the calendar year 1919, in which return there was not included as gross income, the interest received upon bonds owned by the taxpayer secured by mortgages with respect to which the mortgage tax under Article XI of the Tax Law had been duly paid, nor did the return include as gross income, interest received, upon which a tax had been duly paid under the provisions of Article XIV of the Tax Law as amended by Chapter 802 of the Laws of 1911; and an additional assessment having been made under the provisions of Article XVI of the Tax Law on account of the taxpayer's income from the securities mentioned; and the taxpayer having paid under protest, the sum
17 of $1,337.57 for taxes, interest and penalties according to such additional assessments; and said taxpayer having made application under Section 374 of the Tax Law for the recomputation of the tax; and the hearing provided for by Section 374 having been waived by the taxpayer and after due deliberation, it is

Determined that the computation of the tax against said taxpayer including said additional assessments was correct, and did not include any taxes or other charges which could not have been lawfully demanded and no payment was illegally made or exacted thereupon; and the taxpayer is not entitled to any resettlement of the computation of her tax, nor to any readjustment of taxes, interest or penalties.

JAMES A. WENDELL,
Comptroller of the State of New York,
By MARK GRAVES,
Director Income Tax Bureau.

Dater Albany, N. Y., February 8, 1921.

18 *Order of Appellate Division of the Supreme Court of the State of New York Confirming Determination of Comptroller.*

At a Term of the Appellate Division of the Supreme Court, Held in and for the Third Judicial Department, Beginning May 3d, 1921.

Present:

Hon. John M. Kellogg,
Presiding Justice.
Hon. John Woodward,
Hon. A. V. S. Cochrane,
Hon. Michael H. Kiley,
Hon. Charles C. Van Kirk,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE

against

JAMES A. WENDELL, as Comptroller of the State of New York.

The issues raised by the writ of certiorari herein dated February 24, 1921 and the return thereto dated February 24, 1921 having duly come on for hearing before this court at the March Term, 1921, and T. A. Shea, Esq., having been heard on behalf of the relator, and James S. Y. Ivins, Esq., on behalf of the defendant, and due deliberation having been had, it is

Ordered, that the determination of the Comptroller brought up for review by said writ be confirmed with fifty dollars costs and disbursements.

JOSEPH H. HOLLANDS,
Clerk.

19 *Notice of Appeal to Court of Appeals of the State of New York.*

Supreme Court, Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE, Relator,

against

JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.

SIRS:

Please take notice that the relator herein hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division, Third Department, made at a term of the said Appellate Division beginning May 3, 1921 and entered and filed therein; a copy of such order having been duly filed and entered in the office of the Clerk of Albany County on the 5th day of May 1921; confirming the determination of the Comptroller brought up for review by writ of certiorari; and the said relator appeals from each and every part of said order as well as from the whole thereof; and in-

tends to bring up for review all Constitutional questions as well as all others involved in said appeal.

Dated: New York, June 2, 1921.

Yours, &c.,

CULLEN & DYKMAN,
Attorneys for Relator.

Office & Post Office Address 177 Montague Street, Brooklyn, N. Y.

To:

Charles D. Newton,
Attorney General,
The Capitol,
Albany, N. Y.

Clerk of Albany County,
Albany, N. Y.

20 *Remittitur from Court of Appeals.*

Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of December in the year of our Lord one thousand nine hundred and twenty-one, before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER,
Clerk.

Remittitur December 7th, 1921.

21 THE PEOPLE, &c., ex Rel. EMELINE F. CLYDE, Appellant,

ag'st

JAMES A. WENDELL, as Comptroller, &c., Respondent.

Be it remembered, That on the 8th day of June in the year of our Lord one thousand nine hundred and twenty-one, Emeline F. Clyde the appellant in this cause came here into the Court of Appeals, by Cullen & Dykman, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James A. Wendell, as Comptroller &c., the respondent in said cause, afterward appeared in said Court of Appeals by Charles D. Newton, Attorney-General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Arthur E. Goddard of counsel for the appellant, and by Mr. James S. Y. Ivins of counsel for the respondent, and after

due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed,
22 with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

Albany, Dec. 7th, 1921.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER,
Clerk.

23 *Order on Remittitur of Supreme Court of the State of New York, Albany County.*

At a Special Term of the Supreme Court of the State of New York, Held in and for the County of Albany, at the Court House, in the City of Albany, on the 14th Day of January, 1922.

Present: Hon. Charles E. Nichols, Justice.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE, Relator,

against

JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.

The relator above named having heretofore duly obtained an order granting a Writ of Certiorari to review the determination of the State Comptroller in assessing an additional Income Tax against the said relator for the taxable year 1919, and a return having been filed to the said Writ by the State Comptroller, and said proceeding having come on for argument at a term of the Appellate Division, Third

Department, commencing on the first day of March, 1921, and the said Appellate Division by an order entered in the office of the Clerk of the County of Albany on the 5th day of May, 1921, having confirmed the determination of the State Comptroller against the relator with $50 costs and disbursements, and the relator having thereafter appealed to the Court of Appeals of the State of New York
24 from said order, and the Court of Appeals having sent hither its remittitur under date of December 7, 1921, by which it appears that the Court of Appeals has unanimously affirmed the said order of the Appellate Division with costs and has remitted its judgment to this court to be enforced according to law,

Now, on reading and filing the remittitur of the Court of Appeals herein, and on motion of Charles D. Newton, Attorney-General, Attorney for the Comptroller of the State of New York, it is

Ordered, That the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court and the determination of the Comptroller of the State of New York dated February 8, 1921, is hereby in all respects confirmed, and that judgment be entered to the above effect with costs and disbursements to be taxed against the relator.

CHARLES E. NICHOLS,
J. S. C.

25 *Judgment on Remittitur.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on Relation of EMELINE F. CLYDE, Relator,

against

JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.

The relator above named having heretofore obtained an order granting a Writ of Certiorari to review the determination of the Comptroller of the State of New York in assessing an additional Income Tax against the said relator for the taxable year 1919, and said proceeding having come on for argument at a term of the Appellate Division of the Supreme Court, Third Department, commencing on the 1st day of March 1921, and the said Appellate Division by an order entered in the office of the Clerk of the County of Albany on the 5th day of May, 1921, having confirmed the determination of the State Comptroller against the relator with $50. costs and disbursements, and the relator thereafter having appealed to the Court of Appeals of the State of New York from said order, and the Court of Appeals having sent hither its remitittur under date of December 7, 1921, by which it appears that the Court of Appeals unanimously affirmed the said order of the Appellate Division, with costs, and has remitted its judgment to this court to be enforced according to law, and this court by an order duly entered herein hav-

ing ordered that the said judgment and order of the Court of Appeals be made the order and judgment of this court, and
26 the costs of the respondent, the Comptroller of the State of New York, in the Appellate Division and in the Court of Appeals, having been duly taxed at the sum of $170. as per bill of costs filed with the Clerk of this court on this date.

Now, on motion of Charles D. Newton, Attorney-General, Attorney for the respondent, the Comptroller of the State of New York, it is

Adjudged, That the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court, and it is further

Adjudged, That the Comptroller of the State of New York recover from the relator costs in the Appellate Division and in the Court of Appeals, as per Bill of Costs filed herein in the sum of $170.

L. C. WARNER,
Clerk.

27 *Petition for Writ of Error.*

In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE, Relator,

against

JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.

Petition for writ of error requiring the Supreme Court of the State of New York to certify to the Supreme Court of the United States for its review and determination the case of The People of the State of New York on the relation of Emeline F. Clyde, relator, against James A. Wendell, as Comptroller of the State of New York, respondent.

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

The petition of Emeline F. Clyde respectfully shows:

(1) That on the 6th day of December, 1921, the Court of Appeals of the State of New York made and entered a final order and judgment in the above entitled cause in favor of the respondent herein and against your petitioner, in which final order and judgment and in the proceedings had in this cause, certain errors were committed to the prejudice of your petitioner, all of which
28 appear more fully herein below and in the assignment of errors filed in this cause with this petition. That the said Court of Appeals is the highest court of the State of New York in which a decision in this suit or proceeding and matter could be had.

(2) On or about the 12th day of March, 1920, petitioner filed with the Comptroller of the State of New York a return of her income

for the taxable year 1919 as required by law. Such return showed upon its face that petitioner had received certain amounts of income from bonds secured by mortgages recorded in the State of New York with respect to which the mortgage recording tax had been paid in accordance with the provisions of Article XI of the Taw Law of the State of New York, such income amounting to the sum of $26,458.34, and also certain income from secured debts, as defined by the provisions of Article XV of the Tax Law of the State of New York, as amended by Chapter 802 of the Laws of 1911 with respect to which the tax provided by said Article as amended had been duly paid in accordance therewith, such income from secured debts amounting to $32,478.29.

(3) Thereafter the Comptroller notified your petitioner that upon the audit of said return the tax had been recomputed and an additional tax found due with respect to the items and amounts of income above referred to, such additional tax amounting, with certain penalties and interest, to the sum of $1,336.57. The Comptroller demanded payment of such additional tax and the amount thereof was paid by your petitioner under protest and duress on the 21st day of December, 1920.

29 (4) On February 7, 1921, petitioner filed with the Comptroller an application under Section 374 of the Tax Law for the revision of her tax alleging that the additional tax could not have been lawfully demanded and that payment had been illegally exacted from petitioner because the additional tax, including penalties and interest, was levied solely upon income received from bonds owned by petitioner secured by mortgages duly recorded in the State of New York, with respect to which the mortgage recording tax under Article XI of the Tax Law had been duly paid, and upon income received from certain secured debts owned by the petitioner upon which a tax had been duly paid under the provisions of Article XV of the Tax Law as amended by Chapter 802 of the Laws of 1911.

(5) The hearing provided for by Section 374 of the Tax Law having been waived by both parties on the ground that the facts were undisputed and that only a question of law was involved, the Comptroller thereafter and on the 8th day of February, 1921, determined that the computation of the tax against your petitioner, including said additional assessments, was correct and did not include any taxes or other charges which could not have been lawfully demanded and no payment was illegally made or exacted thereupon; and that your petitioner was not entitled to any resettlement of the computation of her tax or any readjustment of taxes, interest or penalties. The Comptroller, in taking such action, professed to exercise an authority under Chapter 627 of the Laws of 1919 as construed by the highest court of the State of New York.

(6) On February 24, 1921, a writ of certiorari was, upon
30 the application of your petitioner, which application was based upon constitutional grounds, duly issued out of the

Supreme Court of the State of New York to the Comptroller of the State of New York, commanding the latter to certify and return his proceedings to the Supreme Court of the State of New York to the end that his determination might be reviewed and if found illegal or erroneous that it might be revised, corrected or readjusted by the said Supreme Court.

(7) The writ of certiorari was duly served and return was made by the Comptroller and thereafter at the March Term, 1921, the matter came on for argument in the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, at which time the constitutional questions involved and hereinafter stated were insisted upon and considered. On or about May 3, 1921, the aforesaid Appellate Division confirmed the determination of the Comptroller brought up for review by the aforesaid writ of certiorari.

(8) The relator on June 2, 1921, appealed to the Court of Appeals of the State of New York from the aforesaid order of the said Appellate Division and in the notice of appeal stated that the questions under both the Federal and State Constitutions involved in the matter would be brought up for review. Thereupon hearing was had in the aforesaid Court of Appeals and your deponent there, as had also been urged in the court below and before the Comptroller, maintained that the State of New York, by the terms of the mortgage recording tax law, aforesaid, effectively contracted with deponent for an exemption from future taxation of in-
31 come received from bonds secured by mortgages, with respect to which the mortgage recording tax was paid prior to the imposition of the present State Income Tax Law; and further that the State of New York effectively contracted with deponent for an exemption from all future State taxation in respect to income from secured debts as defined by the Secured Debt Tax Law, hereinbefore referred to, as to which pursuant thereto the tax therein prescribed had duly been paid; and further that the exemption of mortgages and secured debts in such instances was granted by contract for a valuable consideration, was irrevocable and that impairment of the obligations of such contracts by Chapter 627 of the Laws of 1919, as construed by the highest court of the State of New York, was in violation of Section 10 of Article I of the Constitution of the United States prohibiting a state from passing any law impairing the obligations of contracts.

(9) On the 6th day of December, 1921, the Court of Appeals ordered and adjudged that the order of the Appellate Division of the Supreme Court of the State of New York appealed from be and the same thereby was affirmed. And it was further ordered that the record aforesaid and the proceedings be remitted into the Supreme Court of the State of New York there to be proceeded upon according to law. Thereupon the record and proceedings were duly remitted to the said Supreme Court and on the 14th day of January, 1922, at a Special Term of the Supreme Court of the State

of New York, held in and for the County of Albany, at the Court House in the City of Albany, State of New York, the said judgment and order of the Court of Appeals was made the judgment
32 and order of said Supreme Court of the State of New York, and the determination of the Comptroller was thereby confirmed. Said record is now with said Supreme Court of the State of New York.

(10) Your petitioner contends and alleges that the aforesaid determination of the Comptroller was illegal, erroneous and incorrect because the additional tax, penalties and interest demanded and collected by the State herein were assessed and collected with respect to the income from bonds secured by mortgages recorded in the State of New York with respect to which the mortgage recording tax had been paid, in accordance with the provisions of Article XI of the Tax Law of the State of New York, such income amounting to the sum of $26,458.34; and with respect to the income in the amount of $32,478.29 derived from interest upon secured debts upon which the tax had been duly paid under the provisions of Article XV of the Tax Law as amended by Chapter 802 of the Laws of 1911, hereinbefore set forth; and that the income from these sources is exempt from taxation under the Income Tax Law, such exemption having been secured by valid contracts for a valuable consideration, to wit, by the payment of the secured debt tax with respect to the secured debts yielding the income of $32,478.29 aforesaid, and by payment of the mortgage recording tax with respect to the income from bonds secured by mortgages recorded as aforesaid yielding the income of $26,458.34.

(11) Petitioner alleges that the assessment and collection of the additional income tax for the year 1919, as hereinbefore set forth, violates the provisions of the Constitution of the United
33 States. That so much of Chapter 627 of the Laws of 1919 (as construed by the highest court of the State of New York), conferring authority on the State of New York to tax the aforesaid income from secured debts and from bonds secured by mortgages recorded as aforesaid, in the exercise of which authority such assessment and collection was made, impairs the obligations of contracts validly entered into between the State of New York and your petitioner. That the terms of such contracts, arising from the payment of the secured debt tax and from the payment of the mortgage recording tax as aforesaid, do not permit such assessment or collection and the impairment of such contracts is violative of Section 10 of Article I of the Constitution of the United States as aforesaid. These issues were raised in the court below as well as in this court and are set forth in the record herein.

(12) That your petitioner states that this is a case provided for by Section 709 of the Revised Statutes of the United States in which is involved a final judgment or decree in a suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of a statute of, and an authority

exercised under, this state, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of the validity of such statute and authority.

Wherefore, inasmuch as certain errors appear in the order and judgment entered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto, as recited in the annexed assignment of errors and in the petition herein, your petitioner
34 prays for the allowance of a writ of error directed to the Supreme Court of the State of New York, returnable to the Supreme Court of the United States, for the correction of the errors so complained of, and to the end that said case may be reviewed and determined by said court and that so much of Chapter 627 of the laws of 1919, permitting the imposition and collection of the additional tax aforesaid and the authority exercised thereunder, may be declared unconstitutional and that the judgment and order affirming the determination of the Comptroller of the State of New York may be reversed and that your petitioner have such further relief as to the said Honorable Court may seem just; and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States and that a citation be issued as required by law.

And so your petitioner will ever pray.

EMELINE F. CLYDE,
Petitioner,

By CULLEN & ~~D. J. KINAN~~, Dykman
Attorneys for Petitioner.

35 *Assignment of Errors.*

In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE, Relator,

against

JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.

Remitted to the Supreme Court of the State of New York, County of Albany.

And now comes the relator herein and respectfully submits that in the record, proceedings, decision and final judgment and order of the Court of Appeals of the State of New York, duly remitted to the Supreme Court of the State of New York, County of Albany and made the judgment and order of said Supreme Court of the State of New York, in the above entitled matter, there is manifest error in this, to wit:

First. The Court erred in rendering its final order and judgment in favor of respondent and against the relator.

Second. The Court erred in confirming the determination of the Comptroller brought up for review by writ of certiorari, wherein the Comptroller of the State of New York imposed an additional tax with certain penalties and interest amounting to $1,336.57
36 with respect to the items and amount of income from bonds secured by mortgages recorded in the State of New York, with respect to which the mortgage recording tax had been paid in accordance with the provisions of Article XI of the Tax Law of the State of New York; and with respect to certain income from secured debts, as defined by the provisions of Article XV of the Tax Law of the State of New York as amended by Chapter 802 of the Laws of 1911, with respect to which the tax provided by said Article, as amended, had been duly paid in accordance therewith.

Third. The Court erred in holding that the imposition of the aforesaid additional tax against your petitioner was correct and did not include any taxes or other charges which could not have been lawfully demanded and that no payment was illegally made or exacted thereupon and that such imposition did not constitute an impairment of the obligations of contracts validly entered into, in violation of Article I, Section 10, of the Constitution of the United States.

Fourth. The Court erred in holding that so much of Chapter 627 of the Laws of 1919, in respect to the imposition and collection of the additional tax as aforesaid, under which the Comptroller exercised his authority, was not in violation of so much of Article I, Section 10, of the Constitution of the United States as prohibits a state from passing a law impairing the obligation of contracts.

Fifth. The Court erred in holding that there was no valid contract entered into between the State of New York and the re-
37 lator herein exempting from all future taxation in the State the income from secured debts, as defined by Article XV of the Tax Law of the State of New York, as amended by Chapter 802 of the Laws of 1911, upon which the tax provided for therein had been duly paid by the relator, pursuant to the following provision thereof:

"Sec. 331. * * * All secured debts so indorsed or described in such receipt shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of the state * * *."

and also erred in holding, therefore, that by the imposition and collection of the additional tax aforesaid there was no violation on the part of the State of New York of so much of Article I, Section 10, of the Constitution of the United States, as prohibits a state from passing a law impairing the obligation of contracts.

Sixth. The Court erred in holding that there was no valid contract entered into between the State of New York and the relator herein exempting from all future taxation in the State the income from bonds secured by mortgages recorded in the State of New York, with

respect to which the mortgage recording tax had been duly paid by the relator, pursuant to the provisions of Article XI of the Tax Law of the State of New York, providing as follows:

Sec. 251. * * * "All mortgages of real property situated within the state which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the state, counties, cities, towns, villages, school districts, and other local subdivisions of the state * * *."

and also erred in holding, therefore, that by the imposition and collection of the additional tax aforesaid, there was no violation
38 on the part of the State of New York of so much of Article I, Section 10, of the Constitution of the United States, as prohibits a state from passing a law impairing the obligation of contracts.

Seventh. The Court erred in holding that income derived from interest upon secured debts upon which the tax had been duly paid, and income derived from bonds secured by mortgages, with respect to which the mortgage recording tax had been duly paid, as aforesaid, was not exempt from taxation under the Income Tax Law, namely, Chapter 627 of the Laws of 1919, and that such law, in so far as it permitted such additional tax, was not in violation of so much of Article I, Section 10, of the Constitution of the United States, prohibiting a state from passing a law impairing the obligation of contracts.

Eighth. The Court erred in not reversing the determination of the Comptroller of the State of New York imposing the additional tax as aforesaid.

Wherefore, the relator prays that the judgment, order and decision aforesaid may be reversed, annulled and altogether held for naught; that so much of Chapter 627 of the Laws of 1919, permitting the imposition and collection of the additional tax aforesaid, and the authority exercised thereunder, may be declared unconstitutional; and, further, that the relator have such other and further relief as may be proper and just.

Dated, March 2, 1922.

CULLEN & DYKMAN,
Attorneys for Relator.

39 *Order Allowing Writ of Error.*

Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE, Relator-Appellant,

vs.

JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.

The above entitled matter coming on upon the petition of the relator-appellant this 3rd day of March, 1922, against James A. Wendell, as Comptroller of the State of New York, respondent, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York to which court the judgment and order of the Court of Appeals of the State of New York was duly remitted, according to the form of the statute in such case made and provided, and made the judgment and order of said Supreme Court of the State of New York on the 14th day of January, 1922; and upon examination of said petition and the record in said matter, and desiring to give the petitioner, The People of the State of New York on the relation of Emeline F. Clyde, an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error be and is hereby allowed to be sent from the Supreme Court of the United States to the Su-
40 preme Court of the State of New York, to which court the judgment and order of this court was remitted according to law; upon the relator-appellant giving a bond in the sum of $500.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

41 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said State in which decision could be had in the said suit between The People of the State of New York on the relation of Emeline F. Clyde, relator, and James A. Wendell, as Comptroller of the State of New York, respondent, now before you or some of you, which judgment was on the 14th day of January, 1922, entered in the office of the Clerk of the Supreme Court of the State of New York, in the City and County of Albany, State of New York, wherein was drawn in

question the validity of a statute of, and on authority exercised under said state, on the ground of their being repugnant to the Constitution of the United States, particularly Section 10 of Article I thereof, and the decision was in favor of their validity and against the title, right, privilege or exemption especially set up or claimed under such clause or article of said Constitution; it is alleged that error hath happened to the great damage of the said Emeline F. Clyde, as by her petition appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

42

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 3rd day of March, in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL.] C. W. HIGGINSON,
Clerk of the United States District Court,
Northern District of New York.

The above writ is allowed by

FRANK H. HISCOCK,
Chief Judge of the New York —.

Endorsement on Writ of Error. Copy received, March 3, 1922. James A. Wendell, Comptroller.

43 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To James A. Wendell, as Comptroller of the State of New York:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of New York, in the City and County of Albany, State of New York, wherein The People of the State of New York on the relation of Emeline F. Clyde is the relator and James A. Wendell, as Comptroller of the State of New York, is the respondent, to show cause, if any there be, why the judgment rendered against the said relator as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Frank H. Hiscock Chief Judge of the Court of Appeals of the State of New York at Albany, New York, the 3d day of March in the year of Our Lord, one thousand nine hundred and twenty-two.

FRANK H. HISCOCK,
Chief Judge Court of Appeals, State of New York.

Endorsement on Citation: Copy received March 3, 1922. James A. Wendell, Comptroller.

44 Know all men by these presents, That we, Emeline F. Clyde, as principal, and Royal Indemnity Company, a corporation organized and existing under the laws of the State of New York, as sureties, are held and firmly bound unto James A. Wendell, as Comptroller of the State of New York, in the sum of Five Hundred & 00/100 Dollars, to be paid to the said obligee, his successor, representative and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of March, 1922.

Whereas, lately in a proceeding in the Supreme Court of the State of New York, between The People of the State of New York on the relation of Emeline F. Clyde, relator, against James A. Wendell, as Comptroller of the State of New York, respondent, a judgment and order on remittitur from the Court of Appeals, was rendered against the said relator affirming the determination of the Comptroller of the State of New York made herein, and the said relator having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to *reserve* the said judgment in the aforesaid proceeding, and a citation having been directed to the said Judges of the Supreme Court of the State of New York citing them to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof,

Now, the condition of the above obligation is such that if
45 the said relator shall prosecute her said writ to effect, and ans-er all costs and damages if she fail to make good her plea, then the above obligation to be void, else to remain in full force and virtue.

EMELINE F. CLYDE, [L. S.]
By CULLEN & DYKMAN,
Attorneys.
ROYAL INDEMNITY COMPANY, [SEAL.]
By J. L. NOONAN,
Attorney in Fact.

46 *Approval of Bond.*

I hereby approve the foregoing bond and sureties this 3d day of March, 1922.

FRANK H. HISCOCK,
Chief Judge Court of Appeals,
State of New York.

47 *Præcipe Designating Parts of Record to be Included in Transcript of Record on Writ of Error to the Supreme Court of the United States from the Supreme Court of the State of New York, County of Albany.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE, Relator in Error,

against

JAMES A. WENDELL, as Comptroller of the State of New York, Respondent in Error.

To the Clerk of the Supreme Court of the State of New York, Albany County:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to a Writ of Error allowed in the above mentioned cause and to include in such transcript of record the following, and no other papers, to wit:

1. Petition for Writ of Certiorari, with Waiver and Consent.
2. Order for Writ of Certiorari.
3. Writ of Certiorari.
4. Return to Writ and papers annexed thereto, including
(*a*) Rider annexed to Relator's Income Tax Return for 1919.
(*b*) Letter to Relator of November 22d, 1920.
48 (*c*) Letter to Income Tax Bureau in reply.
(*d*) Letter to William P. Clyde by Assistant Director.
(*e*) Notice of additional assessments.
(*f*) Determination of the Comptroller.
5. Order of Appellate Division of the Supreme Court of the State of New York, confirming determination of Comptroller.
6. Notice of appeal to Court of Appeals of the State of New York.
7. Remittitur from Court of Appeals.
8. Order on remittitur, of Supreme Court of the State of New York, Albany County.
9. Judgment on Remittitur.
10. Petition for Writ of Error.
11. Assignment of Errors.
12. Order allowing Writ of Error.
13. Writ of Error.
14. Citation with endorsement bearing admission of service thereof, as follows: "Copy received, March 3, 1922. James A. Wendell, Comptroller."
15. Bond on Writ of Error. (Omit verifications and omit appointment of resident attorney-in-fact with certificate and verifications thereon.)
16. Approval of bond by the following endorsement:

"I hereby approve the foregoing bond and sureties this 3d day of March, 1922.

FRANK H. HISCOCK,
Chief Judge Court of Appeals,
State of New York."

17. Clerk's certificates.
18. Præcipe for record.

Dated: March 11th, 1922.
Respectfully,

CULLEN & DYKMAN,
Attorneys for Relator in Error.

Office & P. O. Address, 177 Montague Street, Borough of Brooklyn, City of New York.

49 I hereby consent that the papers recited in the foregoing præcipe which were served on me, and which papers were duly filed on the 3d day of March, 1922, are the papers to be returned to the Supreme Court of the United States herein.

Dated: March 14, 1922.

CHARLES D. NEWTON,
Attorney General, Attorney for Respondent in Error.
JAMES S. Y. IVINS,
Counsel.

50 *Clerk's Certificates.*

I, Luther C. Warner, County Clerk of Albany County and Clerk of the Supreme Court of Albany County, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record, prepared and made by me, in accordance with the Præcipe filed in the case entitled: "The People of the State of New York on relation of Emeline F. Clyde, Relator-in-Error against James A. Wendell, as Comptroller of the State of New York, Respondent-in-Error," as the same appears from the original records and files thereof now remaining in my custody and control.

In witness whereof I have hereunto set my hand and affixed the seal of this Court in my office in the City of Albany, Albany County and State of New York this 29 day of March, 1922.

[Seal County of Albany, July, 1841.]

L. C. WARNER,
Clerk.

51 STATE OF NEW YORK,
County of Albany, ss:

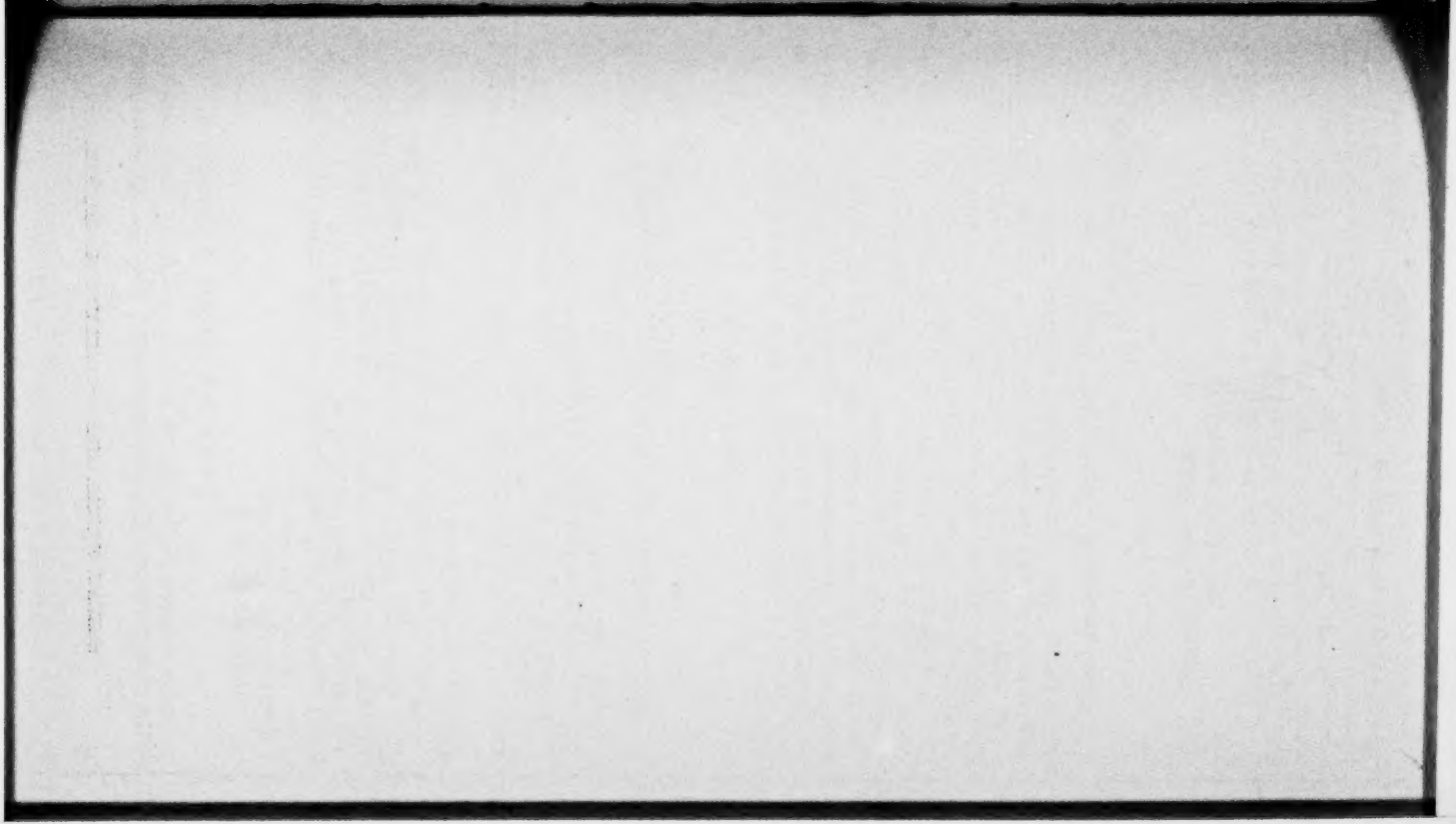
I, Luther C. Warner, Clerk of the County of Albany and Clerk of the Supreme Court of the State of New York in and for said county (said Court being a Court of record) do hereby certify that I have compared the annexed with the original records as stipulated and filed in my office and that the same is a true transcript thereof and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said County and Court this 29 day of March, 1922.

[Seal County of Albany, July, 1841.]

L. C. WARNER,
Clerk.

Endorsed on cover: File No. 28802. New York Supreme Court. Term No. 847. The People of the State of New York on the relation of Emeline F. Clyde, plaintiff in error, vs. James A. Wendell, as Comptroller of the State of New York. Filed April 1st, 1922. File No. 28802.



FILED
MAR 22 1923
W. R. STANSBU
CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 318.

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of EMELINE F. CLYDE,
Plaintiff-in-Error,

against

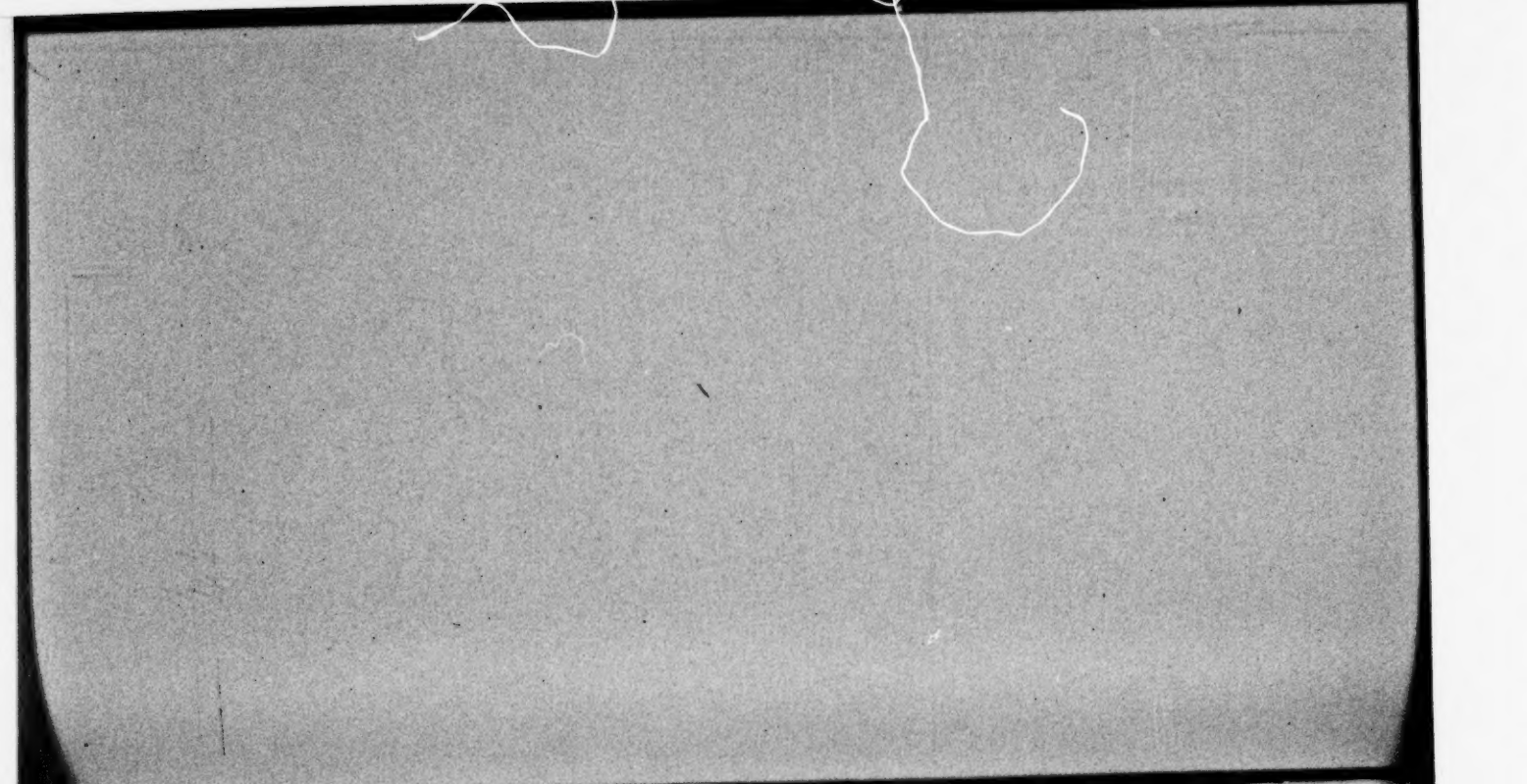
JOHN F. GILCHRIST, President, JOHN J. MERRILL and MARK GRAVES, constituting the State Tax Commission of the State of New York,
Defendants-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR

CULLEN and DYKMAN,
Attorneys for Plaintiff-in-Error,
177 Montague Street,
Brooklyn, N. Y.

ARTHUR E. GODDARD,
Of Counsel.

Stillman Appellate Printing Co.



INDEX OF BRIEF

PAGE

Statement 1-10

Errors Relied Upon 10-13

Point I—The Federal question was properly raised in the State Courts..... 14

Point II—The State of New York may effectively contract for an exemption from future taxation 15-18

Point III—The exemption of secured debts in this case was granted by contract for a valuable consideration and is irrevocable 18-24

Point IV—The exemption of mortgage bonds in this case was likewise granted by contract for a valuable consideration, and is irrevocable..... 24-29

Point V—The exemption from taxation of both secured debts and mortgage bonds was sufficiently broad and definite to preclude a tax upon the income therefrom 29-42

Point VI—The unconstitutional features of the New York Income Tax Law, which form the subject matter of this case, are readily severable..... 42-43

PAGE

Point VII—The final order of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department should be reversed, upon the ground that the determination of the Comptroller of the State of New York, confirmed by such order, was erroneous and illegal in so far as an income tax was imposed by such determination upon the plaintiff-in-error with respect to her income from the mortgage bonds and Secured Debts involved in this case, and the case should be remitted for further proceedings by the Appellate Division in conformity with such reversal 43

INDEX OF APPENDICES

in accompanying volume.

PAGE

Appendices 1-55

Appendix A—Abstract (with copy of all relevant portions) of New York Income Tax Law, being Article 16 of New York Tax Law, added by Chapter 627, Laws of 1919, with amendments of 1920 where applicable to year 1919..... 1-18

PAGE

Appendix B—Abstract (with copies of all relevant portions) of the New York Mortgage Recording Tax Law, being Article 11 of the New York Tax Law, as it existed prior to the enactment of the New York State Income Tax Law..... 19-38

Appendix C—Copy of New York Tax Law on secured debts, being Article 15 of New York Tax Law, added by Chapter 802 of the Laws of 1911... 39-43

Appendix D—Copies of opinions of the Appellate Division of the State of New York for the Third Judicial Department in the case of The People of the State of New York *ex rel.* Central Union Trust Company of New York, Trustee of the Estate of Marcia Ann Gavit, Relator, vs. James A. Wendell, as Comptroller of the State of New York, Respondent (197 App. Div., p. 131)..... 45-55

LIST OF CASES CITED.

PAGE

Coe vs. Errol (116 U. S., 517)..... 36

Columbia Water Power Co. vs. Columbia E. St. R'way, Lt. & Power Co. (172 U. S., 475) 14

Cornell vs. Coyne (192 U. S., 418)..... 36

Grand Lodge vs. New Orleans (166 U. S., 143) 15

Gray vs. Darlington (15 Wallace, 63)..... 39

Hancock vs. Singer Mfg. Co. (62 New Jersey Law, 343, concurring opinion)..... 30

Hartman vs. Greenhow (102 U. S., 271)....17, 21

Home of the Friendless vs. Rouse (8 Wallace, 430, 437) 40

Matter of Watson (226 N. Y., 384)..... 16

McCullough vs. Virginia (172 U. S., 102).... 22

McGahey vs. Virginia (135 U. S., 662)..... 21

New Jersey vs. Yard (95 U. S., 104).....18, 20

Opinion of the Justices (220 Mass., 624).... 30

PAGE

Peck vs. Lowe (247 U. S., 165).....35, 36, 37

People *ex rel.* Clyde vs. Wendell (197 App. Div., 913)..... 9

People *ex rel.* Central U. Trust Co. vs. Wendell (197 App. Div., 131).....17, 39

People vs. Trust Co. of America (205 N. Y., 74, 77)..... 26

Pollock vs. Farmers' Loan & Trust Co. (157 U. S., 429; 158 U. S., 601).....30, 37

Powers vs. Detroit & G. H. Ry. (201 U. S., 543, 556, 559).....15, 40

U. S. Glue Co. vs. Oak Creek (247 U. S., 321).....35, 38

Virginia Coupon Cases (114 U. S., 270)..... 21

Wilmington R. R. Co. vs. Reid (13 Wall., 264) 15

Wright vs. Central of Ga. Ry. Co. (236 U. S., 674, 679).....15, 41

Wisconsin & Michigan Ry. Co. vs. Powers (191 U. S., 379)..... 19

Yazoo and M. V. Ry. Co. vs. Adams (180 U. S., 1)..... 14

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 318.

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of Emeline F. Clyde,
Plaintiff-in-Error,

against

JOHN F. GILCHRIST, President, John J. Merrill and Mark Graves, constituting the State Tax Commission of the State of New York,
Defendants-in-Error.

BRIEF OF THE PLAINTIFF-IN-ERROR.

Statement.

This case is brought here by writ of error allowed by Hon. Frank H. Hiscock, Chief Judge of the New York Court of Appeals, on March 3, 1922, addressed to the Supreme Court of the State of New York (on remittitur from the Court of Appeals of the State of New York). The proceeding originated in the Appellate Division of the Su-

preme Court of the State of New York for the Third Judicial Department under a writ of certiorari issued by that Court to review the determination of James A. Wendell, as Comptroller of the State of New York, the original defendant-in-error. After this case had been docketed in this Court, the powers and duties formerly vested in the Comptroller of the State of New York with respect to the assessment, collection and review of assessments of taxes in general were transferred to the State Tax Commission of the State of New York, consisting of John F. Gilchrist, John J. Merrill and Mark Graves, the present defendants-in-error, who were substituted upon motion and stipulation, by order of this Court granted February 26, 1923. The present defendants-in-error will, as members of the State Tax Commission, be the persons to revise the assessment of the plaintiff-in-error, in case her contentions are sustained by this Court.

The determination of the Comptroller of the State of New York, which was brought up for review by certiorari in the New York Courts, was made under Article 16 of the Tax Law of the State of New York, a copy of all relevant portions of which are hereto appended as "Appendix A," imposing an income tax upon individuals resident, or deriving income from sources, within the State of New York. The plaintiff-in-error, who was a resident of that State and was assessed as such, complained of the assessment in so far as it imposed an income tax upon income which she derived from two classes of securities held by her during the taxable year 1919, and the income from which she

asserts had been made effectively exempt from all taxation, by virtue of contracts validly entered into by the State of New York with the plaintiff-in-error, such contracts being protected from impairment by the provisions of Article I, Section 10, of the Constitution of the United States.

The first class of securities in question consists of bonds, secured by mortgage recorded in the State of New York, with respect to which the Mortgage Recording Tax had been paid as provided by Article 11 of the Tax Law of the State of New York, commonly known as the Mortgage Recording Tax Law, a copy of all relevant portions of which is hereto appended as "Appendix B." The portion of this Mortgage Recording Tax Law providing for exemption from other taxation is found in Section 251 and reads in part as follows:

> "All mortgages of real property situated within the state which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the state, counties, cities, towns, villages, school districts, and other local subdivisions of the state, except etc." (See *infra*, pages 31, 32).
>
> (This Section has been in effect since the year 1906.)

The income derived from such mortgage bonds by the plaintiff-in-error and, as she asserts, wrongfully assessed for income tax, amounted to $24,-

458.34 (fol. 2) and a tax at the rates prescribed by the New York Income Tax Law was assessed and collected upon this amount of income.

The second class of securities in question consists of "Secured Debts," as defined by the Tax Law of the State of New York, comprising generally bonds and other similar obligations, not secured by mortgage recorded within the State of New York. The plaintiff-in-error paid the tax with respect to these securities owned by her as provided by Chapter 802 of the Laws of 1911, amending the Tax Law of the State of New York by adding Article 15 thereto, entitled, "Tax on Secured Debts," a copy of which is hereto appended as "Appendix C." The portion of this article of the Tax Law providing for the exemption of Secured Debts, as to which the Secured Debt Tax was paid, is found in Section 331, reading as follows:

> "Sec. 331. Payment of Tax on Secured Debt. Any person may take or send to the office of the Comptroller of this State any secured debt or a description of the same, and may pay to the state a tax of one-half per centum on the face value thereof under such regulations as the Comptroller may prescribe, and the Comptroller shall thereupon make an indorsement upon said secured debt or shall give a receipt for the tax thereon describing said secured debt and certifying that the same is exempt from taxation, which indorsement or receipt shall be duly signed and dated by the Comptroller or his duly authorized repre-

sentative. The Comptroller shall keep a record of such indorsements and receipts with a description of such secured debt, together with the name and address of the person presenting the same and the date of registration. All secured debts so indorsed or described in such receipt shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of the state except as provided in sections twenty-four, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine of this chapter, and in articles ten and twelve of this chapter."

(These exceptions, provided for by the last five lines just quoted, are fully considered *infra* pages 31, 32).

Plaintiff-in-error acted under this "Tax on Secured Debts" (Appendix C), the important section of which (Section 331) is copied just above. This "Tax on Secured Debts" continued in effect unchanged until the year 1915, when it was amended. It was further amended in 1916, a substitute being provided and in 1917 this substitute, the title of which was then changed to "Tax on Investments" was further amended. The "Tax on Investments" was finally repealed in 1920.

Since the plaintiff-in-error availed herself of the original Act (Appendix C) the various amendments and repeals of the "Tax on Secured Debts" and its equivalent the "Tax on Investments" are material in this case only as indicating the atti-

tude of the New York Legislature from time to time toward the exemptions granted upon prior payments, and also as indicating, as is pointed out *infra*, page 33, that after the Legislature had increased the amount of the tax on Secured Debts, or "Investments" as they were then called, and had lessened the period of exemption, it saw fit in its Income Tax Law to recognize its more recent exemptions for which it obtained more satisfactory prices, and utterly to ignore the earlier exemptions which up to that time had been recognized and confirmed by every amendment of the law.

For these reasons a brief summary of the several amendments may not be out of place, although it is thought unnecessary to cumber this brief with full copies. The Laws of 1915, Chapter 465, broaden the definition of Secured Debts in a manner not material to this case, and amend Section 331 (*supra*) by increasing the amount of the prescribed payment from ½ of 1% to ¾ of 1% and *by limiting the period of exemption to five years from the date of the payment.* This amendment applied only to payments made after May 1, 1915, and was careful, by the addition of a new section, (Section 338), to provide for the continued exemption of Secured Debts as to which the tax might be or have been paid prior to May 1, 1915. This new Section 338, the substance of which is found in the later amendments of the law, as stated below, is comparatively brief and reads as follows:

> "Section 338. Exemption where tax has been paid on secured debts before May 1st, nineteen hundred and fifteen. If a tax shall

have been paid upon a secured debt pursuant to article fifteen of the tax law prior to May 1st nineteen hundred fifteen, such secured debt shall be exempt from taxation hereunder and from all taxation in the state or any of the municipalities or local divisions of the state except as provided in sections twenty-four, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine of this chapter, and in articles ten and twelve of this chapter." (As to these exceptions, see *infra,* pages 31, 32.)

The Laws of 1916, Chapter 261, further amend the "Tax on Secured Debts" in minor respects not material in this case, and re-enact Section 338, confirming exemptions previously obtained, without change.

The Laws of 1917, Chapter 700, change the title of Article 15 of the New York Tax Law from "Tax on Secured Debts" to "Tax on Investments." They change the basis of the tax so as to provide for a payment at the rate of 20c. per year on each one hundred dollars or fraction thereof of the face value of the investment, and provide for the payment of this amount and the exemption of the security in such case for any number of years up to five. This amendment of 1917 amended Article 15 of the Tax Law in other respects not material in this case, and again confirmed, by Section 338, (amended in immaterial respects) exemptions obtained, like that of the plaintiff-in-error, prior to May 1, 1915.

The effect of these amendments may be summarized as follows:

1. Original law, Chapter 802, Laws 1911, Appendix A, provided for tax of ½% of principal for exemption during life of security.

2. Amendment of 1915, Chapter 465, increased amount of tax to ¾ of 1% and limited exemption to a period of five years from date of payment, and confirmed prior exemptions.

3. Amendment of 1916, Chapter 261, made immaterial changes, but again confirmed prior exemptions.

4. Amendment of 1917, Chapter 700, changed basis of tax to 1/5 of 1% per annum for any number of years up to five, providing exemption for the same number of years, and confirming all prior exemptions.

5. Article 15 of the New York Tax Law, *i. e.*, the "Tax on Investments" substituted by the Laws of 1917, was repealed by the Laws of 1920, Chapter 646.

The income which the plaintiff-in-error derived from Secured Debts, and which she asserts was wrongfully assessed for income tax, amounted to $32,478.29 (fol. 2) and a tax at the rates prescribed by the New York Income Tax Law was assessed and collected upon this amount of income.

The Comptroller of the State of New York having refused, upon the application of the plaintiff-in-error, to omit these two items of income from assessment, a writ of certiorari for the purposes of reviewing and correcting the assessment was obtained from the Appellate Division of the Supreme Court for the Third Department. The Appellate Division affirmed the determination of the Comptroller without opinion.

People ex rel. Clyde vs. Wendell (197 App. Div., 913).

An appeal from the determination of the Appellate Division was taken by the plaintiff-in-error to the Court of Appeals of the State of New York which affirmed the judgment of the Appellate Division, also without opinion (232 N. Y., 550).

The Appellate Division for the Third Department wrote an opinion in the case of *People ex rel. Central Union Trust Company vs. Wendell* (197 App. Div., 131), which was argued at the same time as this case, but which involved only the validity of the New York State Income tax with respect to the income from mortgage bonds, and did not deal with the income from Secured Debts in any way. Since this opinion of the Appellate Division will be referred to at some length below, for the convenience of the Court it, together with the dissenting opinion of the presiding justice, is appended hereto in full as "Appendix D."

Before the Comptroller of the State of New York and again before the Appellate Division and the Court of Appeals, plaintiff-in-error asserted that

the New York State Income Tax Law was invalid and unconstitutional in so far as it imposed an income tax upon the income from mortgage bonds and Secured Debts, as to which exemption from all state and local taxation had been obtained under the express provisions of the Tax Law, by the payment of the Mortgage Recording Tax and the Secured Debt Tax, respectively. The basis of the assertion was that contracts had arisen from the payments made in accordance with the prior statutes, and that the subsequent Income Tax Law impaired the obligation of these contracts in violation of both the State and Federal Constitutions. The decision of the State Courts upholding the validity of the Income Tax Law must of course be taken as disposing of the claim of the plaintiff-in-error in so far as the *State* Constitution was concerned, and as confining the question to the validity of the New York Income Tax Law under the *Federal* Constitution.

A motion to dismiss this writ of error was made before this Court by the learned Attorney General of New York and briefs were submitted by both sides. The motion remains undecided at this time, but it will be assumed, in writing this brief, that the motion will be denied.

Errors Relied Upon.

The assignment of errors found in the Transcript of Record at pages 19-21 contains eight assignments of error, all intended to raise only the one point, namely, that the New York Income Tax Law, Chapter 627 of the Laws of 1919, was uncon-

stitutional under the impairment clause of the Federal Constitution in so far as it imposed an income tax upon the income of mortgage bonds and Secured Debts previously exempted from all taxation by contract for a valuable consideration.

We believe that the "Second," "Fifth," "Sixth" and "Seventh" assignments of error sufficiently present the question. They are as follows (Transcript of Record, pp. 20-21):

> "Second. The Court erred in confirming the determination of the Comptroller brought up for review by writ of certiorari, wherein the Comptroller of the State of New York imposed an additional tax with certain penalties and interest amounting to $1,336.57 with respect to the items and amount of income from bonds secured by mortgages recorded in the State of New York, with respect to which the mortgage recording tax had been paid in accordance with the provisions of Article XI of the Tax Law of the State of New York; and with respect to certain income from secured debts, as defined by the provisions of Article XV of the Tax Law of the State of New York as amended by Chapter 802 of the Laws of 1911, with respect to which the tax provided by said Article, as amended, had been duly paid in accordance therewith."

> "Fifth. The Court erred in holding that there was no valid contract entered into between the State of New York and the relator

herein exempting from all future taxation in the State the income from secured debts, as defined by Article XV of the Tax Law of the State of New York, as amended by Chapter 802 of the Laws of 1911, upon which the tax provided for therein had been duly paid by the relator, pursuant to the following provision thereof:

> 'Sec. 331. * * * All secured debts so indorsed or described in such receipt shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of the state * * *.'

and also erred in holding, therefore, that by the imposition and collection of the additional tax aforesaid there was no violation on the part of the State of New York of so much of Article I, Section 10, of the Constitution of the United States, as prohibits a state from passing a law impairing the obligation of contracts."

"Sixth. The Court erred in holding that there was no valid contract entered into between the State of New York and the relator herein exempting from all future taxation in the State the income from bonds secured by mortgages recorded in the State of New York, with respect to which the mortgage recording tax had been duly paid by the relator, pursuant to the provisions of Article XI of the Tax Law of the State of New York, providing as follows:

'Sec. 251. * * * All mortgages of real property situated within the State which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the state, counties, cities, towns, villages, school districts, and other local subdivisions of the State * * *.'

and also erred in holding, therefore, that by the imposition and collection of the additional tax aforesaid, there was no violation on the part of the State of New York of so much of Article I, Section 10, of the Constitution of the United States, as prohibits a state from passing a law impairing the obligation of contracts."

"Seventh. The Court erred in holding that income derived from interest upon secured debts upon which the tax had been duly paid, and income derived from bonds secured by mortgages, with respect to which the mortgage recording tax had been duly paid, as aforesaid, was not exempt from taxation under the Income Tax Law, namely, Chapter 627 of the Laws of 1919, and that such law, in so far as it permitted such additional tax, was not in violation of so much of Article I, Section 10, of the Constitution of the United States, prohibiting a state from passing a law inpairing the obligation of contracts."

POINT I.

The federal question was properly raised in the State Courts.

The outcome of this case depends entirely upon the validity, under the Constitution of the United States, of a portion of a statute of the State of New York, *i. e.*, of so much of the Income Tax Law of that State as purports to tax the income from mortgage bonds and secured debts, previously exempted from "all taxation" pursuant to the provisions of prior statutes. Since effect was necessarily given by the decision of the State Courts to the subsequent statute imposing the Income Tax with respect to the securities in question, this case falls within the second class of cases, as to which jurisdiction was conferred upon this Court by Revised Statutes §709, now Judicial Code §237, and the Federal question was properly and sufficiently raised in the State Courts (see Transcript of Record, fols. 5, 19, 31, 32, 33, 36, 37, 38, 41).

Columbia Water Power Co. vs. Columbia E. St. R'way, Lt. & Power Co. (172 U. S., 475);

Yazoo and M. V. Ry. Co. vs. Adams (180 U. S., 1).

POINT II.

The State of New York may effectively contract for an exemption from future taxation.

Apart from restrictions contained in the State Constitution, the foregoing proposition is conclusively settled by decisions of this Court.

Wilmington R. R. Co. vs. Reid (13 Wall., 264);
Grand Lodge vs. New Orleans (166 U. S., 143);
Powers vs. Detroit & G. H. Ry. (201 U. S., 543, 556, 559);
Wright vs. Central of Ga. Ry. Co. (236 U. S., 674, 679).

In the *Powers* case, just cited, the general rule was stated (p. 556) as follows (italics ours):

> "It has often been decided by this court, so often that a citation of authorities is unnecessary, that the legislature of a State may, *in the absence of special restrictions in its constitution,* make a valid contract with a corporation in respect to taxation, and that such contract can be enforced against the State at the instance of the corporation."

The only restrictions as to exemptions from taxation found in the New York Constitution is that

in Article III, Section 8, forbidding the enactment of private or local bills granting exemption from taxation on real or personal property. The statutes which granted the exemptions as to mortgage bonds and Secured Debts, which we rely upon, concededly were neither private nor local, but general and applicable throughout the whole state.

Furthermore, although the State of New York for years collected the mortgage recording and secured debts taxes and never, until this income tax law was passed, essayed to violate the terms of the exemptions from taxation, it was never held that either statute was unconstitutional, but on the contrary, the constitutionality of the Secured Debts Tax was necessarily adjudged by the Court of Appeals of the State of New York in

Matter of Watson (226 N. Y., 384),

in which, overruling the lower courts, that Court held constitutional an amendment to the New York Tax Law which prescribed an additional inheritance tax upon secured debts held by a decedent unless he had paid the Secured Debt Tax thereon or the same had been taxed by the local authorities. This case necessarily decided that the Secured Debt Tax was constitutional, for certainly the estate of a decedent could not be subjected to an additional tax because the decedent had not complied with an unconstitutional law.

The status of the exemption from taxation granted by the Mortgage Recording Tax Law of the State of New York (§251 quoted in part *supra*

p. 3) cannot be differentiated in the slightest degree from the status of the exemption under the New York Secured Debts Tax Law (§331 quoted in full *supra* pp. 4, 5) in so far as its validity under the New York Constitution is concerned, and it is at least worthy of note that the constitutionality under the State Constitution of the exemption from taxation of mortgage bonds *was not even questioned* by the Appellate Division in its opinion in the contemporaneous case involving the validity of the New York Income Tax Law with respect to income from mortgage bonds.

> *People ex rel. Central U. Trust Co. vs. Wendell* (197 App. Div., 131; opinions appended hereto in full as Appendix D).

The argument, suggested by the learned Attorney General in the State Courts, to the effect that the exemption of the securities in question in this case was invalid *ab initio*, for the reason that the State Legislature had no right to barter away the right of taxation, or thus to bind the action of future legislatures, must be regarded as utterly refuted, whether in the case of a special or general statute, by numberless cases decided in this Court, a few of which are cited at the beginning of this Point, and also, as to a general statute, by the case of

> *Hartman vs. Greenhow* (102 U. S., 271).

In this last case, which is cited also under the following Point, Mr. Justice Miller of this Court, who was the only Justice to dissent, indicated distinctly in his brief statement, that a similar argument had been raised and disposed of adversely in that case as well as in previous cases.

See for instance the opinion of the same Justice in the case of

New Jersey vs. Yard (95 U. S., 104).

POINT III.

The exemption of secured debts in this case was granted by contract for a valuable consideration and is irrevocable.

The distinction between such an exemption from taxation as this and one granted as a favor or bounty, without special consideration moving to the State, is plain.

It has been held in many cases decided in this Court and the State Courts that statutes conferring exemptions from taxation without other consideration than *general* benefits to the people of the states, or the supposed benefits of encouraging the building of railroads in general, or the establishment of manufacturing or other industries, do not constitute contracts within the protection of the impairment clauses of the Federal and of many state constitutions. This principle we regard as the established rule of this Court in dealing with

such exemptions and we have no quarrel whatsoever with the rule. The nature, and perhaps the extent of the rule, are illustrated by a case decided by this Court

Wisconsin & Michigan Ry. Co. vs. Powers
(191 U. S., 379),

where it is said that, in enacting a general statute for exemption from taxation of certain railroads, which might thereafter be built in the State of Michigan, "the Legislature is not making promises."

But in this case we assert that the Legislature of the State of New York *was* making promises, and for the following reasons:

The Secured Debt Tax Law of New York, while admittedly a general law applicable throughout the State, nevertheless resulted in *specific contracts* between the State and those who chose to comply with that law.

This proposition is borne out by the following considerations:

1. The statute was *optional*; that is, the owner of Secured Debts was under no obligation to act under it.

2. A substantial *cash consideration, i. e.,* one-half per cent of the principal of the obligation, was actually paid to and acepted by the State.

3. The inducement for the payment to the State was the exemption "thereafter" from "all taxation."

4. The bargain was directed to be signed in behalf of the State by its Comptroller by the following provision of §331 (quoted in full *supra,* pp. 4, 5; also Appendix C; italics ours):

> *"the Comptroller shall thereupon make an endorsement upon said secured debt or shall give a receipt for the tax thereon, describing said secured debt and certifying that the same is exempt from taxation."*

These considerations, we believe, bring this case squarely within the principle of the case of

New Jersey vs. Yard (95 U. S., 104),

where it was pointed out that any doubt, which might otherwise exist, in determining whether the state legislature intended to enter into a contract obligation, or merely to enact a repealable statute, should certainly be resolved in favor of contract, when, as in that case, the statute directed a contract to be executed. In this case the direction to the State Comptroller to execute a receipt for the tax and a certificate that the security is exempt from taxation cannot be distinguished in principle.

The suggestion made in the State Courts by the learned Attorney General, that this exemption from taxation of Secured Debts did not result in contracts and was repealable, because it was provided for by the terms of a *general* statute overlooks both the essence of, and the reason for, the rule. It is general *bounty* statutes which give rise

to no contract rights, the reason being a lack of consideration. But if there be a consideration, it can hardly matter whether the statute be general or specific. Consider, for instance, a statute which authorizes a state to borrow money and issue bonds for the repayment thereof. Such a statute is more a general statute than the New York Secured Debts Tax Law, for it is addressed to any one in the world who will advance money to the state, rather than to a restricted class of taxpayers of New York. And yet general statutes authorizing states to borrow money and issue their bonds have been held repeaedly to create or result in contracts which may not be impaired by subsequent legislation, the reason being in such cases, as in this, that the state, although acting under the authority of a general law, nevertheless enters into *specific commercial contracts* with such as choose to deal with it on that basis.

Hartman vs. Greenhow (102 U. S., 271);
Virginia Coupon Cases (114 U. S., 270);
McGahey vs. Virginia (135 U. S., 662).

In those cases the question arose as to the right of the State of Virginia to repudiate the obligations of a statute passed in relation to certain bonds issued by the State in payment of which it had made default. The statute provided for a compromise with the bondholders by the issue of new bonds, which, including their coupons, any holders might use at par in the payment of taxes that might thereafter be imposed. This Court stated in the *McGahey* case, just cited:

> "• • • We have no hesitation in saying that the Act of '71' was a valid Act and that it did and does constitute a contract between the State and holders of the bonds issued under it and that the holders of the coupons of said bonds, whether attached thereto or separate, are entitled by a solemn obligation of the State to use them in payment of state taxes and public dues."

This is quoted with approval in subsequent cases, summarized at length in the case of

McCullough vs. Virginia (172 U. S., 102).

The application of those cases to the present case is readily seen when it is appreciated that the bonds and coupons referred to in those cases were greatly depreciated in value and that such depreciation was the reason for the attempt on the part of the State to rescind the previous statutory provision that such bonds and their coupons might be used at par in the payment of taxes. Thus the contract in those cases dealt with taxation as well as with the borrowing of money.

We are unable to perceive any substantial difference betwen the statute in those Virginia coupon cases, which provided for the optional payment of future taxes in a very much depreciated currency and the statute in our case, which provided for the optional payment of a lump sum in lieu of future taxes. We submit those cases as conclusively answering the suggestion above referred to, that

contract obligations may not arise under the terms of a general statute. This is even emphasized by the brief dissent of Mr. Justice Miller of this Court in the *Hartman* case (*supra*).

The difference of construction accorded to acts of incorporation and to general bounty statutes, the one class being usually held to create contracts, and the other to confer only repealable privileges, has no application to a statute which authorizes the State to settle with either its creditors or its taxpayers *on a purely commercial basis*. In the case of bounty statutes the State grants exemption, being moved by the anticipated advantage to its citizens generally. In cases like the present, the State deals with the taxpayer on a purely commercial basis and receives the consideration directly as a corporate entity. It is not at all the case of a general benefit which it is supposed or hoped will accrue to the public.

The argument that the payment of this Secured Debt Tax should not be taken as a sufficient consideration to support a binding contract, because the State *might* have obtained the same amount of money by a special tax upon Secured Debts, cannot be admitted. In the first place, such Secured Debts were already subject to all general personal property taxation in the State. In the next place, the State *did not* impose any such special tax upon Secured Debts, and therefore the payment of the tax did not constitute the performance of any obligation already existing. Further, *if what might have been is to be considered,* the plaintiff-in-error *might* have sold her secured debts and in-

vested in Federal bonds, or *might* even have removed from the State of New York. Still further, the State, in any case where it grants a charter to a corporation with an exemption from taxation, which would be enforced by this Court as a contract, *might* have refused to make the grant and have insisted upon collecting the taxes, and yet it is far too late to suggest such an argument as sufficient to defeat the contract. If it be said that the State of New York need not have made the offer of exemption in this case, it may be said with equal force that the holders of the secured debts need not have purchased them at all. In this case, where every element of a plain and binding contract exists, we think that the suggestion that the contract is not binding because it need not have been made, approaches the absurd, for the same argument, if sustained, would affect the validity of all contracts.

POINT IV.

The exemption of mortgage bonds in this case was likewise granted by contract for a valuable consideration, and is irrevocable.

The same considerations support this Point as the similar preceding Point III with respect to Secured Debts, except that for a payment of the same amount, *i. e.*, one-half of one per cent. of the principal amount secured by the mortgage, the mortgagee received, in addition to the exemption

of the mortgage from other taxation, the privilege of recording the mortgage and escaped the prohibitions provided by §258 of the Mortage Recording Tax Law (Appendix B) against releasing, extending, foreclosing or offering in evidence a " mortgage as to which the tax was not paid. We submit, however, that this difference between the status of Secured Debts and mortgage bonds is one of degree only and not of principle, for the following reasons:

1. The statute was *optional,* that is, the mortgagee was under no obligation to pay the tax unless he chose to record his mortgage.

This is evident from the terms of the Act itself, §253 and §257, (Appendix B), providing in part as follows (italics ours):

> "§253. *Recording Tax.* A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by *a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six,* is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article * * *."

> "§257. *Payment of Taxes.* The taxes imposed by this article shall be payable *on the recording* of each mortgage of real property *subject to taxes hereunder* * * *."

The provisions of §252 to the effect that no mortgage of real property shall be exempt from the taxes imposed by this article and the provisions of §265 that the tax imposed by the article shall be deemed to be a lien upon the mortgage upon which the tax is imposed, must obviously be taken as referring only to *recorded* mortgages, for it is only such which are taxed by the article.

It has been held by the highest court of New York that this recording tax is an excise tax and not a property tax, in the case of

> *People vs. Trust Co. of America* (205 N. Y., 74, 77),

where it was said (p. 77):

> "The tax imposed by that statute (*i. e.*, the prior act of 1905 taxing mortgages) was a property tax. The mortgage at that time was subject to no recording tax, which is an excise tax, and so far as appears in the complaint the defendant has done nothing since to subject it to any liability to taxation. The Legislature could not impose such a tax upon the defendant for a transaction which, at the time it was effected, was subject to no tax."

2. A substantial cash consideration, *i. e.*, one-half per cent. of the principal of the mortgage and the same as that provided in the case of Secured Debts was actually paid to and accepted by the State.

3. One of the vital inducements for the payment of the tax was the exemption from taxation found in §251 as follows (italics ours):

> "§251. *Exemption from Local Taxation.* All mortgages of real property situated within the state which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation *by the state,* counties, cities, towns, villages, school districts and other local subdivisions of the state (except certain taxes, more remote than income taxes as argued below pp. 31, 32)."

In passing, it should be noted that the heading of Section 251 just quoted is erroneous, since taxation *by the state* is embraced in the exemption as well as local taxation.

The fact that the recording of the mortgage and the escape from the disabilities of §258 referred to above, may also have served as an added inducement for the payment of the tax, is immaterial if, as we assert to be the case, the State intended to hold out the exemption from other taxation, state and local, as a part, even, of the consideration for the payment.

4. The recording officer was directed by §257 "to indorse upon each mortgage a receipt for the amount of the tax so paid."

If it be argued that, although there was no *actual* compulsion on the part of a mortgagee

to record his mortgage and pay the recording tax, nevertheless the results of not recording and paying were such that they amounted to a *practical* compulsion, and thus that the exemption from taxation could not have furnished a substantial consideration, an answer is found in the fact that there certainly was no compulsion on the part of anyone to invest in mortgages at all, and if one chose to invest in such securities and pay the tax to the State, the exemption from other taxation, evidenced by a receipt endorsed upon the security itself by direction of the statute, should, together with the payment, be taken as evidencing a complete and binding contract, which we have no doubt whatever was just what the State Legislature intended to hold out to mortgagees.

In any event, the decisions holding general bounty statutes repealable do not apply, for here the State is dealing over the counter, as it were, for cash, rather than for anticipated general benefits, and sells exemptions to definite persons who are given receipts by an officer directed by the State to deal with them in its behalf.

POINT V.

The exemption from taxation of both secured debts and mortgage bonds was sufficiently broad and definite to preclude a tax upon the income therefrom.

The language of the exemption with reference to Secured Debts is found in §331 (Appendix C) and reads as follows (italics ours):

> "All secured debts so indorsed or described in such receipt shall *thereafter be exempt from all taxation* in the state or any of the municipalities or local divisions of the state *except as provided in sections twenty-four, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine of this chapter, and in articles ten and twelve of this chapter.*"

The language of the exemption with reference to mortgage bonds is found in §251 (Apepndix B) and reads as follows (italics ours):

> "All mortgages of real property situated within the state which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, *shall be exempt from other taxation by the state,* counties, cities, towns, villages, school districts and other local sub-

divisions of the state, *except that such mortgage shall not be exempt from the taxes imposed by sections*, etc." (*i. e., the same taxes specified in the exception from the exemption of Secured Debts quoted just above, omitting only Article twelve*).

That the language of these exemptions from "all taxation" and "other taxation" respectively, should be taken as embracing taxation of the income from the same securities, is established by the case of

Pollock vs. Farmers' Loan & Trust Co.
(157 U. S., 429; 158 U. S., 601).

By the opinion written after the reargument of that historic case, it was settled that a general income tax upon the income of real or personal property, or both, was a direct tax upon the property yielding the income. Although the *Pollock* case had to do with the provision of the Federal Constitution requiring apportionment of direct taxes, the decision was placed upon fundamental principles and considerations of universal application. The question was simply: "Is an income tax a direct tax on the property yielding the income?" The answer was in the affirmative.

The decision in the *Pollock* case has been held applicable to matters of state taxation in the cases of

Opinion of the Justices (220 Mass., 624);
Hancock vs. Singer Mfg. Co. (62 New Jersey Law 343, concurring opinion),

which indicate that the *Pollock* case is not to be construed as having reference only to some narrow special field of Federal constitutional law.

Indeed, it is plain, we think, that the *Pollock* case goes further than we need go, for it held income taxes to be *direct* taxes upon the property yielding the income, while here, since the exemptions refer to "all taxation" and "other taxes," it should be unnecessary to show that a tax is a *direct* tax, to make it repugnant to the exemptions.

The application of the *Pollock* case to the taxation in question is further and, we think, strongly supported by the very exceptions to the exemptions from taxation, italicized in the foregoing quotations. These exceptions clearly emphasize the scope and breadth of the exemptions which were sold by the State of New York to those who chose to buy. Section twenty-four provided for the taxation of bank shares, and surely taxation for the account of the owner of shares of a bank holding Secured Debts or mortgage bonds is less a tax upon the Secured Debts or mortgage bonds than a tax directly upon the income therefrom. Sections one hundred eighty-seven, one hundred eighty-eight and one hundred eighty-nine, imposing franchise taxes on insurance corporations and various banks, surely also provide for less direct taxation upon Secured Debts or mortgage bonds held by such corporations than does the income tax; the exception of Article ten of the Tax Law, which provides for the transfer tax, appears to us almost conclusive of the assertion that the exemptions extended to income taxes, for it is established beyond ques-

tion, both in the Courts of this State and the Federal Courts as well, that a transfer or inheritance tax is not a tax upon the property of the decedent, but rather upon the privilege of taking by inheritance, bequest or devise, so that, if it was deemed necessary by the Legislature to except such remote taxes as these, it cannot seriously be asserted that the exemptions did not cover income taxes, held by this Court to be direct taxes upon the property yielding the income; the relative remoteness of inheritance taxes is plainly indicated by the fact that the State of New York can and does tax the inheritance of Federal bonds, while it cannot and does not tax the income from the same securities; Article twelve of the Tax Law imposing a tax on transfers of stock surely constituted an unnecessary exception from the exemption as to Secured Debts, if such exemption did not cover income taxes. The fact that the Legislature in defining the exemptions was so scrupulously careful also to define the exceptions from the exemption and to except taxes for more remote than income taxes, is sufficient under all the fundamental rules of statutory construction to show that the exemption should not be taken as excepting income taxes, whether or not any such taxes were then on the books or even contemplated.

The Legislature itself has, we think, made a further important admission also in the very terms of the Income Tax Law, §359 (Appendix A), reading in substance as follows (italics ours):

> "§359. Gross Income Defined. The term 'gross income' * * * 2. *Does not include* the

following items which shall be exempt from taxation under this article, * * * d. *Interest upon * * * investments upon which the tax provided for in section three hundred and thirty-one of this chapter* (the Investment Tax so-called) *has heretofore been paid since June first, nineteen hundred and seventeen,* during the period of years for which such tax shall have been paid."

(The relation of this Investment Tax to the Secured Debt Tax is given above at pages 5 to 8 incl.)

Why, we ask, is the income from "investments" (the new name for "Secured Debts" selected when the amount of the tax was increased and the period of exemption decreased) upon which the "investment tax" was paid since June 1, 1917, *exempted from the income tax at all,* unless for the reason that the Legislature recognized the unfairness of taxing income from securities but recently made tax exempt. The conclusion is, to our minds, irresistible that the Legislature did not take the view which the Attorney General has sought to sustain, namely, that an income tax has no relation to a tax upon the source of the income. Unfortunately, the conclusion is also irresistible that the Legislature proposed to be fair and comply with its previous contracts only to a limited extent and, worse still, to an extent determined solely by a consideration of the relative advantages and disadvantages to it of the terms of these various contracts. The proposition that an exemption granted for one year on payment of one-fifth of one per cent. of the

principal has any greater effect or wider scope than an exemption in exactly the same language granted for ten or twenty years on payment of a single sum of one-half of one per cent. does not appeal to us, and we think the Legislature should have spared the State of New York the charge that it measures the extent of its obligations by the subsequently determined adequacy of the consideration, rather than by the letter and spirit of the obligations themselves.

Another provision of the very Income Tax Law under which the tax in question in this proceeding was imposed, proves beyond all doubt that the Legislature recognized the necessary relation between income taxes and *ad valorem* property taxes. The provision referred to is Section 352 of the Tax Law (Appendix A) providing that after July 31, 1919, certain personal property, including *"bonds, notes and choses in action owned by any individual, subject to the income tax, shall not be included in the valuation of the personal property included in the assessment rolls of the several tax districts,* etc." (Italics ours.) This is a clear admission that the income tax was nothing more nor less than a substitute for the *ad valorem* taxes previously imposed, and also that if an income tax is to be collected, the property yielding the income should not in fairness be also taxed. We admit that the Legislature might, *except for an exemption previously granted,* have taxed both the principal and the income of personal property, but our point is that the fact it did not see fit to do so, and the language of Section 352 unmistakably indicate that taxation

of the tree and taxation of the fruit, to which the Attorney General several times referred in the State Courts, have, after all, an extremely intimate relation.

We might well rest our argument here upon the authority of the *Pollock* case, except for the argument of the learned Attorney General in the State Courts that the authority of the *Pollock* case had been overruled or modified by the more recent cases of

Peck vs. Lowe (247 U. S., 165);
U. S. Glue Co. vs. Oak Creek (247 U. S., 321).

In the *Peck* case this Court upheld the validity of the Federal income tax in the case of an exporter. That case, however, has in no way impaired the authority of the *Pollock* case. In the first place, it is inconceivable that the Supreme Court would, without even alluding to its previous decision in a case of such importance that it affected the power of the Federal Government to lay a tax for its own support, have overruled, modified or even limited, the principle announced in its previous decision. In the next place, the two cases are entirely consistent, for it was early settled by the United States Supreme Court that the constitutional prohibition against the laying of taxes on exports was intended only to prohibit the taxation of exports *as such*. General property taxes were upheld in spite of the fact that they might include property destined for export. This principle was announced in the cases of

Coe vs. Errol (116 U. S., 517);
Cornell vs. Coyne (192 U. S., 418).

In the *Coe* case just cited, this Court said:

> "It cannot be taxed as exports; that is to say, it cannot be taxed by reason of or because of its exportation or intended exportation, for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any state, yithout the consent of Congress, from laying any imports or duties on imports or exports. * * * But if such goods are not taxed, as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed?"

In the *Peck* case, after citing previous authorities, the Court proceeded to place its decision upon the grounds specified at pages 174 and 175, as follows (italics ours):

> "It (the Federal Income Tax) is not laid on income from exportation *because of its source, or in a discriminative way,* but just as it is laid on other income. The words of the Act are 'net income arising or accruing from all sources.' *There is no discrimination.*"

Furthermore, in the *Peck* case it was expressly recognized that the argument that a general income tax upon net incomes was only an indirect burden, had no application to any income which Congress had no power to tax for it was said at page 174:

> "On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see *Stanton vs. Baltic Mining Co., supra* [*i. e.*, 240 U. S., 103] p. 113), it is both nominally and actually a general tax."

The statement just quoted we submit as a complete answer to the argument of the learned Attorney General, for in this case the State of New York was without power to tax these securities, which had been exempted from *all taxation, direct or indirect, special or general, discriminative or otherwise, the very exceptions* (*ante,* pages 31, 32) *showing this to be the case. In short, these securities had deliberately and carefully been given the same status as Federal bonds with respect to taxation by the State.* In this aspect of the case the following langage from the *Pollock* case (second case, 158 U. S., 601) is peculiarly applicable (page 630):

> "But if, as contended, the interest when received has become merely money in the recipi-

> ent's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax."

In the *Glue Company* case (*supra*), this Court again applied the test of *discrimination* in upholding the validity of the Wisconsin Income Tax Law with respect to the income of a corporation engaged partially in interstate commerce. It was said at page 329 (italics ours):

> "Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; *and if there be no discrimination* against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

We submit, therefore, that even if the decision in the *Pollock* case were treated as modified by the *Peck* and *Glue Company* cases (*supra*), the learned Attorney General would still have to read into the exemptions in this case the words *"discriminative taxes"*, and who in the wide world would have paid for an exemption from *"discriminative taxes"*.

As for the ground taken by the Appellate Division in its opinion in the contemporaneous case of

> *People ex rel. Central Union Trust Co. vs. Wendell* (197 App. Div., 131; Appendix D),

that in granting the exemption as to mortgages, the Legislature had in mind only the system of taxation then in effect, and not income taxes, we have only to point out the *Pollock* case, which had been the established law of the land for about ten years; also the fact that there had been prior income taxes in this country.

See

> *Gray vs. Darlington* (15 Wallace, 63),

also that the possibility of income taxes was considered of sufficient moment, for years before and after the enactment of the exemption statutes in question, to establish the custom of inserting in corporate securities generally the well known "Tax free covenant clause," the effect of which is still evident in the present Federal Income Tax Laws.

That the language of the exemptions in this case is quite sufficient to require the construction that

the exemptions were intended to continue *during the life of the securities* in question in plain, not only from the broad language of the exemptions, the fact of the endorsement upon the security itself, and from the fact that the Legislature, with respect to Secured Debts, at least, confirmed all exemptions previously obtained upon every occasion when it amended the law (see the history of these amendments *supra*, pages 5 to 8 incl.), but also from decisions of this Court the application of which is obvious:

Powers vs. Detroit & Grand Haven Ry.
(201 U. S., 543, 556, 559).

In that case the act of incorporation provided simply that the company should pay an "annual tax of one per cent. on the capital stock of said company paid in, which tax shall be in lieu of *all other taxes.*" It was said at page 559:

> "It is suggested that this provision is not in terms made perpetual. A sufficient answer to this is found in *Home of the Friendless vs. Rouse, supra* (*i. e.*, 8 Wallace, 430) (p. 437):
>
> > 'Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. "All property of said corporation shall be exempt from taxation," are the words used in the act of incorporation, and there is no need of supplying any words to ascertain the

> legislative intention. To add the word "forever" after the word "taxation" could not make the meaning any clearer. It was undoubtedly the purpose of the legislative to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the legislature, without taking direct action on the subject, could at its will resume the power of taxation.' "

We are quite aware of the rule that exemptions from taxation are to be strictly construed in favor of the State, and have no quarrel with the rule, so long as the necessary limitation of the rule to the bounds of common sense is applied. That there is a limit to the whittling down of exemptions beyong the obvious intent and spirit of the contract, is shown not only by the *Powers* case, just cited, but also by the case of

> *Wright vs. Central Ga. Ry.* (236 U. S., 674, 679),

in which this Court gave effect to the *purpose and intent* of the grant of exemption in spite of the suggestion that certain words had been omitted, and this for the reason, as stated at page 679:

> "We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant."

The language just quoted is singularly apposite here, for if the State Courts are to be upheld, then indeed the Legislature has both practiced "a cunning deception" and made "a futile grant."

POINT VI.

The unconstitutional features of the New York Income Tax Law, which form the subject matter of this case, are readily severable.

The New York Income Tax Law contains a specific provision (§2, near the end of Appendix A) to the effect that if any clause, sentence, paragraph or part of the act be adjudged invalid, the remainder shall not be affected.

The State Courts have construed this act as imposing a tax upon the income from mortgage bonds and Secured Debts, as to which the previous respective taxes were paid, as in the case of the plaintiff-in-error, so that, although there is no express mention in the act of either of these classes of tax exempt securities, §359 (Appendix A), must be taken as imposing the income tax with respect to them.

These classes of tax exempt securities are growing less every day as the mortgages and Secured Debts mature, since of course renewals cannot be claimed to be exempt.

Under these circumstances, there can be no doubt that the provisions are severable and that a holding that the New York Income Tax Law is unconstitutional as to these securities, which were made tax

exempt prior to the enactment of that law, would not affect the validity, or even the convenient enforcement, of the remainder of the law.

POINT VII.

The final order of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department should be reversed, upon the ground that the determination of the Comptroller of the State of New York, confirmed by such order, was erroneous and illegal in so far as an income tax was imposed by such determination upon the plaintiff-in-error with respect to her income from the mortgage bonds and Secured Debts involved in this case, and the case should be remitted for further proceedings by the Appellate Division in conformity with such reversal.

Respectfully submitted,

CULLEN & DYKMAN,
Attorneys for Plaintiff-in-Error.

ARTHUR E. GODDARD,
Of Counsel.

APR 4 1923
WM. R. STAR

Supreme Court of the United States

October Term, 1922

No. 318

The PEOPLE OF THE STATE OF NEW YORK on the Relation of EMELINE F. CLYDE,

Plaintiff in Error,

vs.

JOHN F. GILCHRIST, JOHN J. MERRILL and MARK GRAVES constituting the State Tax Commission of the State of New York,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

CARL SHERMAN,
Attorney-General of New York,
for Defendants in Error,
Capitol, Albany, N. Y.

C. T. DAWES,
JAMES S. Y. IVINS,
FRANCIS W. CULLEN,
Counsel.

INDEX OF POINTS

PAGE

Preliminary Statement 4

Point I — The promise of the State was exemption from (1) general personal property taxes (2) assessed locally (3) upon the face value of the securities. A new tax upon persons computed upon income does not fall within the contract 8

Sub-point I — The principal of mortgages and secured debts was exempted. The interest was not 17

Point II — Taxing the income is not taxing the principal 23

Point III — Assuming the exemption covered interest, the contract is not violated by the requirements of the Personal Income Tax Law of New York State 25

LIST OF CASES CITED

	PAGE
Burgess v. Seligman (107 U. S. 20, 34)	8
Gillespie v. Oklahoma (257 U. S. 501, 505)	23
Gulf and Ship Island R. R. v. Hewes (183 U. S. 66, 76)	8
Long Sault Development Co. v. Call (242 U. S. 272)	8
Matter of Watson (226 N. Y. 384, 402–405)	15
Messages from the Governors of New York State, Vol. X, 800, 920	13, 14
New Orleans v. Stempel (175 U. S. 309, 316)	8
People ex rel. Braeburn Association v. Hanking (154 A. D. 679)	21
People ex rel. Central Union Trust Company v. Wendell (197 A. D. 137)	7
People ex rel. Metropolitan Street Railway Co. v. Tax Commissioners (174 N. Y. 417, 444)	9
People v. Roper (35 N. Y. 629)	9
People ex rel. West Fire Insurance Co. v. Davenport (91 N. Y. 574, 586)	9
Pollock v. Farmers' Loan and Trust Company (157 U. S. 429; 158 U. S. 601)	19, 23
Public Papers of Governor Dix (p. 70)	14
Shelby County v. Union and Planters' Bank (161 U. S. 149)	20
State ex rel. Interborough Rapid Transit Co. v. Sohmer (207 N. Y. 270; affirmed 237 U. S. 276)	9
State v. Hinkel (Wis.) (116 N. W. 639)	21
Troy Union R. R. v. Mealy (224 N. Y. 187; affirmed 254 U. S. 47, 50)	9
University v. People (99 U. S. 309, 323)	11

Supreme Court of the United States

October Term, 1922

No. 318

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of EMELINE F. CLYDE,
Plaintiff in Error,

against

JOHN F. GILCHRIST, JOHN J. MERRILL and MARK GRAVES, Constituting the State Tax Commission of the State of New York,
Defendants in Error.

A motion was presented to this Honorable Court by these defendants on the 12th of March, 1923, to dismiss the writ of error herein, counsel endeavoring to show that the decision of our Court of Appeals was reached without the determination of a Federal question. Assuming that this court has denied the motion (its action at this time being unknown to us) and has decided to entertain the argument on the merits, feeling perhaps that whether or not the Court of Appeals of New York State gave some effect to the subsequent statute in reaching its decision, and that this court ought to examine the exemption statutes to ascertain if under them a contract with the State arose of the nature claimed by the plaintiff in error, assuming, as we say, that the writ

has not been dismissed, we desire to set down briefly the following:

PRELIMINARY STATEMENT

This proceeding was instituted in the Appellate Division of the Supreme Court of the State of New York upon a writ of certiorari to review the determination of James A. Wendell, as Comptroller of the State of New York, in assessing a personal income tax against the relator which included in gross income from which net income was thereafter derived certain interest on mortgages and certain interest on secured debts which it is claimed by the plaintiff in error could not be included because the State had theretofore exempted from taxation such income under earlier statutes of the State.

A substitution of new parties defendant has been accomplished with the consent of this court.

Article 11 of the New York State Tax Law covers the " Mortgage Recording Tax " enacted in 1906 (chapter 532), and article 15 covers the " Secured Debts Tax," enacted in 1911 (chapter 802). In 1919 (chapter 627) the " Tax on Personal Incomes " was created and added as article 16 of the Tax Law. The question presented to this court is whether the first two statutes contracted an exemption from taxation which was sought to be taken away by the last statute.

The mortgage tax called for was one-half of 1 per cent. on the principal debt or obligation secured, and the secured debt tax was likewise one-half of 1 per cent. on the face value. We are speaking of the mortgage tax and the secured debt tax as they existed in 1911, which are the ones under consideration here.

THE MORTGAGE TAX

(Counsel have inserted the italics)

"Sec. 253. *Recording tax.*—A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof *of principal debt or obligation* which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article." (Laws of 1907, Chapter 340, Section 293; present Section 253 of the Tax Law.)

THE EXEMPTION

"Sec. 251. *Exemption from local taxation.* —All mortgages of real property situated within the state which are taxed by this article and the debts and the obligations which they secure together with the paper writings, evidencing the same, *shall be exempt from other taxation by the state, counties, cities, towns, villages, school districts and other local subdivisions of the state*, except that such mortgage shall not be exempt from the taxes imposed by sections twenty-four to twenty-four-g, both inclusive, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine and article ten of this chapter." (Laws of 1906, Chapter 532, Section 291; present Section 251 of the Tax Law.)

THE SECURED DEBTS TAX AND THE EXEMPTION

"Sec. 331. *Payment of tax on secured debt.*—Any person may take or send to the office of the comptroller of this state any secured debt or a description of the same, and may pay to the state a tax of one-half per centum *on the face value thereof,* under such regulations as the comptroller may prescribe, and the comptroller shall thereupon make an endorsement upon said secured debt or shall give a receipt for the tax thereon, describing said secured debt and certifying that the same is exempt from taxation, which indorsement or receipt shall be duly signed and dated by the comptroller or his duly authorized representative. The comptroller shall keep a record of such indorsements and receipts with a description of such secured debt, together with the name and address of the person presenting the same and the date of registration. All secured debts so indorsed or described in such receipt *shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of the state* except as provided in sections twenty-four, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine of this chapter, and in articles ten and twelve of this chapter." (Chapter 802 of Laws of 1911, § 331.)

The plaintiff in error owned securities upon which these taxes had been paid and claims exemption from taxation on the income from such

securities, although both taxes are in purpose and effect taxes on *personal property* and are laid only upon the *principal amount of the debt or obligation.* The exemption from other taxation, the State claims, is of the same nature as the tax and freed the securities upon which such taxes had been paid from all other taxation of like kind — from other general personal property taxes.

Indeed, at the time these statutes were written there was no such form of tax in this State as the Personal Income Tax (created later, in 1919), and the exemption statutes themselves refer in the title and in the context of the sections to an exemption from taxation locally by the State, by municipalities and by other local divisions (a direct State tax laid upon real and personal property in this State is collected locally, the local units acting as agents for the State in the collection of the tax. Tax Law, §§ 58 and 91). In other words, the exemption was of other forms of taxation to which such securities had been subjected by the various jurisdictions in usual course for years — the promise of the State was one tax, one place, on personal property in the form of mortgages and secured debts, and no other of such taxes as theretofore.

The Appellate Division of our Supreme Court and our Court of Appeals wrote no opinions (197 App. Div. 913; 232 N. Y. 550), but affirmed the determination of the State Comptroller in taxing the interest received from such securities. The Appellate Division did, however, in the case of *People ex rel. Central Union Trust Company* v. *Wendell*, 197 App. Div. 137, argued at the same

term as this case, write an opinion, and for that reason perhaps the courts thought it unnecessary to write in both cases, considering the same principles applicable to both questions of exemption. The *Central Union Trust Company case* involved the interest on mortgages on which a prior mortgage tax had been paid and, as we say, is one of the same questions involved in this proceeding.

The Appellate Division took the view as hereinbefore expressed (the opinion is attached to this brief) that the mortgage tax statute exempted from other *personal property taxes* the *principal indebtedness,* " the particular kind of taxation as then existed against which relief was being granted," but that the statute made no mention of and did not intend to grant exemptions from other known or unknown taxes or from other than taxes of the same kind, *i. e.*, taxes on the principal of the securities.

POINT I.

The promise of the State was exemption from (1) general personal property taxes (2) assessed locally (3) upon the face value of the securities. A new tax upon persons computed upon income does not fall within the contract.

The courts of our State have rendered their honest judgment that such was the intent of our statutes, and we approach this court with reliance upon its confirmance of fair judicial decision. (*Long Sault Development Co.* v. *Call*, 242 U. S. 272; *Gulf & Ship Island R. R.* v. *Hewes*, 183 U. S. 66, 76; *New Orleans* v. *Stempel*, 175 U. S. 309, 316; *Burgess* v. *Seligman*, 107 U. S. 20, 34.) Nor will this court condemn an attitude, consistent for years, opposed always to the ex-

tension of tax exemptions and strong in the preservation of the governmental power to perdure by new and necessary taxation. (*People* v. *Roper*, 305 N. Y. 629; *People ex rel. West Fire Insurance Co.* v. *Davenport*, 91 N. Y. 574, 586; *State ex rel. Interborough Rapid Transit Co.* v. *Sohmer*, 207 N. Y. 270; affd., 237 U. S. 276; *Troy Union R. R.* v. *Mealy*, 224 N. Y. 187; affd., 254 U. S. 47, 50.) As expressed in *People ex rel. Metropolitan Street Railway Co.* v. *Tax Commissioners*, 174 N. Y. 417, 444: "Shadows, however, should give way to substance, and the right to create a new system of taxation and bring in property of a new character, hitherto untaxed * * * cannot, as we think, be denied upon principle and should not be withheld from the Legislature unless required by some controlling decision of the court."

Starting with a fundamental provision early inserted in our tax law that

> "All real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law." (Tax Law, § 3.)

the Legislature produced in 1906 a new tax, the recording tax upon mortgages, and in 1911 a new tax, the tax upon secured debts.

Upon payment of a tax equal to one-half of one per cent. on the "*principal debt or obligation*" secured by a mortgage, the mortgage, the statute says, "shall be exempt from other taxation by the state, counties, cities, towns, villages,

school districts and other local subdivisions of the state," (Tax Law, § 251.)

Upon payment of a tax of one-half of one per cent. "*on the face value*" of a secured debt, such secured debt "shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of the state. (Tax Law, § 331.)

What compelling reason created these laws? Though we cannot produce here the many public documents of the State, the many exhaustive reports of legislative committees and legislative investigating bodies, it is a fact, and a fact which this court can with its experience take notice of, that personal property almost generally escaped assessment on the local assessment rolls. No ingenuity, assuming local assessors possessed that qualification, could compel disclosure of ownership of this kind of property. Such as did come into the open as parts of decedents' estates was practically the only property of this class actually subjected to personal property taxation.

To secure some tax from this class of property, the mortgage tax and the secured debts tax were devised, and they were devised simply to *counteract this evasion.*

The extent of the exemption promised is measured, we conceive, more accurately by consideration of the purposes and by a consideration of the rate of tax, than by any other means or argument. In lieu of personal property taxes assessed locally at rates sometimes as high as 4 or 5 per cent. on the face value, the State will collect the mortgage tax and the secured debts tax at one-half of one per cent. and will relieve mortgages

upon which a tax has been paid "from *other* taxation by the state, counties, cities, towns, villages, school districts and other local subdivisions of the state," and will relieve secured debts which have paid a tax "from *all* taxation in the state or any of the municipalities or local divisions of the state."

The slight difference in language makes no difference of meaning in the two exemptions. "Other" taxation is other taxes which they formerly paid or had fear of if they did not pay. "All" taxation means as well all existing taxation. The classification in both instances is borne out by the immediate recital by the statutes of *existing* taxes from which they were not relieved — the tax on bank shares (Sec. 24 ,Tax Law), the franchise tax on insurance companies (Sec. 187, Tax Law), the franchise tax on trust companies (Sec. 188, Tax Law), the franchise tax on savings banks (Sec. 189, Tax Law), the inheritance tax (Art. 10, Tax Law), and the tax on transfers of stock (Art. 12, Tax Law).

Payment of the lower rate of tax accomplished but one exemption, that of local personal property taxation, and at that the State and the localities conceded anywhere from two per cent. to as much as four or five per cent. for a one-half of one per cent. tax. The reason for *complete* exemption *forever* does not exist, nor was it even complete at the time, as the statutes themselves show. The language of complete exemption is easily drafted: "All property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes." (*University* v. *People*, 99 U. S. 309, 323.)

If a test of the mortgage tax exemption arises from the title of section 251, we have it in "Exemption from Local Taxation." And nowhere could the extent of the exemption covered by the Secured Debts Law be better exemplified than in section 336, which declares the owner shall be relegated as usual to the local assessment rolls if he does not take advantage of the new tax.

> "Sec. 336. *No deduction of debts against taxable secured debts.* The owner of any secured debt, on which the tax provided for in this article has not been paid, shall be assessed upon such secured debt in the taxing district in which he resides, upon the fair market value of such secured debt and no deduction for the just debts owing by him shall be allowed against the assessed value of such secured debt, as provided in section twenty-one of this chapter or elsewhere in this chapter or in any other law of this state."

Governor Higgins in explaining to the people his approval of the Mortgage Tax Law of 1905, said:

> "This act imposes, *in lieu of the present general property tax,* an annual tax of one-half of 1 per cent. on all mortgages recorded in this State after July 1, 1905."
>
> "Mortgages are by the act *exempted from taxation by counties, cities and other local subdivisions of the State.* Holders of existing mortgages may at their option avail themselves of the privileges of taxation under this act, but existing mortgages are not otherwise affected."

"Mortgages *have heretofore been subject to the general tax rate* in every locality in the State except when held by exempt holders, non-residents, or persons whose indebtedness is in excess of their personal assessment. The local rate averages at least 2 per cent., and in many localities is much higher. When mortgages have been taxed undue hardship has been the result. When they have escaped taxation discrimination has been made. The tax imposed by the new law is moderate in amount and uniform in operation."

(Messages of the Governors of New York State, Vol. X, p. 800.)

And in approving the Act of 1906:

"This bill substitutes a single recording tax of one-half of one per cent. on mortgages for the annual tax of one-half of one per cent., which superseded *the general property tax* on mortgages imposed prior to July 1, 1905. One-half of the proceeds of the tax goes to the State and one-half to the local subdivisions of the State.

"Mortgages are property and, like other property, should be taxed for the support of the government, general and local. * * * But it has been estimated that more than 80 per cent. of all mortgages were either exempt by law from the general property tax or else successfully evaded taxation; * * *

"The recording tax is an improvement on the unfair, unequal and indefensible *general property tax on mortgages.* It has the support of two-thirds of the members of both

houses of the Legislature, who should know and reflect the views of their constituencies." (Messages of the Governors of New York State, Vol. X, p. 920.)

Goxernor Dix in 1911 in requesting the Legislature to pass the Secured Debts Tax bill transmitted a message which reads, in part:

"The proposed tax is at a fixed rate of one-half per cent. upon the face value, like the mortgage recording tax. The payment of this tax will carry with it *exemption from liability to local assessment.* It is notorious that this class of property is so easily concealed that it is rarely discovered by the local assessor. The occasions on which such property is disclosed are chiefly when it passes at death for the support of widows and orphans. Then the local rate is so high as to take frequently a third to a half or more of the income. And when by some chance such securities are placed upon the roll, it usually happens that the next year the owner no longer has them in his possession subject to taxation.

"These conditions have led to many suggestions for a fair specific tax *as a substitute for* the inequalities and unfair burdens of the *local assessment of such personal property.* Where such a plan has been adopted, as in our mortgage recording tax and in similar tax measures in other States, the result has always been an increase in the revenue and in the satisfaction of the taxpayers. People do not object to a fair and reasonable tax

> which bears equally on all, but they cannot be blamed for evading a law so notoriously unfair in its operations as the local taxation of personal property, under which a few are caught for heavy taxes and the vast majority escape." (Public Papers of Governor Dix, p. 70.)

Our courts have announced the same reasons for the mortgage tax and the secured debts tax, and expressed at the same time the same judgment of the extent of the exemption. (*Matter of Watson*, 226 N. Y. 384, 402–405):

> " By the Mortgage Tax Law (*People ex rel. Eisman* v. *Ronner*, 185 N. Y. 285) the assessment of mortgages was taken from the local authorities and a flat rate fixed by the state, one-half of the moneys going to the state and one-half to the locality. The assessors no longer had any judicial discretion in the assessment of mortgages. * * *
>
> " In this case of the bond investment tax, a large amount of property could not be reached for assessment by the local authorities. As above stated, there was no means under the law to determine who held such securities and to what amount. The estates passing through the Surrogates' Courts bore witness to the inability of the existing tax system to equalize the burdens and to reach all property.
>
> " To remedy this condition, the legislature passed article XV of the Tax Law which permitted a flat rate of tax upon such investment securities as might otherwise go un-

taxed; and, with the intent, no doubt, of inducing bondholders to make known their holdings and to submit to this tax, it *exempted* such property from the inequality and irregularities of *local assessment*. This was an attempt to reach a class of property which was not bearing its proportionate part of governmental expenses, to make just the tax laws and to meet a situation which for a long time had been apparent to every one familiar with the subject and which was quite difficult to regulate. The nature of the holdings made the local assessments many times unequal and unjust, often bearing heavier upon a small owner than upon one possessed of large amounts unknown to the assessors.

* * * * * * *

"The tax on investments is not compulsory but optional. An owner is not compelled to submit to a state tax. He may register his bonds with the state comptroller and pay a certain amount according to face value and thus free the securities from *local assessment*. If he does not choose to do this he can *submit to local assessment* which is according to *actual value with full opportunity to be heard.*"

Attending again to the provisions of the statutes themselves, we find they do refer to exemption from other taxation by the State, but the Legislature in that expression is merely classing the State along with the municipalities in the matter of general personal property taxation, for such State taxes were before the passage of the acts under consideration, and are now collected

locally and turned into the State Treasury by the local collecting officers. (Tax Law, §§ 58, 91.)

The same sort of exemption from personal property taxation was exhibited when the Legislature in 1917, prior to the tax on personal incomes (1919) enacted a franchise tax on corporations based on net income. Corporations paying that tax were not to be assessed on any personal property or capital stock in any "taxing district" (Sec. 219-j, Laws of 1919, chap. 726), or as the statute now reads: "After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property, or capital stock." (Laws of 1920, chap. 640.)

Altogether, as evidenced by the decision of our court in the case here under review and in the *Central Union Trust Co. case,* in which an opinion was written (197 App. Div. 131), "It was the particular kind of taxation as then existed against which relief was being granted."

THE PRINCIPAL OF MORTGAGES AND SECURED DEBTS WAS EXEMPTED. THE INTEREST WAS NOT.

As indicated by the corporation franchise tax based on net income, the State in 1917 and 1919 was entering into the field of taxation with income as a measure. It proceeded by the corporation tax of 1917 to exempt the principal of all personal property of the corporation, not only securities but personal property in the form of machinery, equipment, etc., but the income it was taxing. Surely, the exemption from personal property taxation was by the very operation of

the statute confined to principal. The promise of exemption was the same as in the Secured Debts and Mortgage Tax Laws — exemption from local personal property taxation, which meant taxation on the principal alone.

We shall proceed with the argument, directing it to the Secured Debts Tax, as the same reasoning applies to the Mortgage Tax and to the Secured Debts Tax.

The exemption for secured debts was granted by section 331 of the Tax Law as added by chapter 802 of the Laws of 1911. It provided that secured debts (defined in a prior section) might be presented to the Comptroller for indorsement, or description in a receipt, and a tax of one-half per centum on the face value thereof paid, and that:

> "All secured debts so endorsed or described in such receipt shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of the state" (with the exception of certain specified taxes).

The *debts* were exempted. The substitute tax was paid on the *debts*. If the secured debts tax were not paid, the *debts* were taxable locally, for State and local purposes, as personal property — taxable equally with real and tangible personal property — on the regular assessment rolls. The *interest* on the debts had never been taxed. *The interest was not considered in fixing or paying the secured debts tax.* And there was nothing in the statute to indicate any intent to exempt the *interest*, if it should ever become the policy of the State to reach *interest* by taxation.

At the time the Secured Debts Tax Law was enacted, we had no Income Tax Law, in being or in contemplation. Interest was not subject to taxation. There was no reason for intending to exempt it.

In computing the secured debts tax the principal only of the debts was considered — " the face value thereof." Every secured debt showed on its face the rate of interest and the duration of the loan. It could be readily ascertained, from the *face* of the instrument, the gross amount of interest as well as of principal secured. But nobody ever suggested that interest secured should be considered in computing the tax. Then why in fixing the exemptions?

My adversaries argue from *Pollock* v. *Farmers' Loan & Trust Co.*, that a tax on income is a tax on principal — but it does not follow that an exemption of principal implies an exemption of interest. Here, certainly, there was no tax on the income. The interest rate, or its duration had nothing to do with the tax. The tax did not touch interest in any way. Why should the exemption?

Why should we *assume* that the Legislature, in imposing a tax on *principal* only, intended to exempt *interest* from a form of taxation not even in contemplation? "

We have said that in computing the secured debts tax the principal only of the debts was considered — " the face value thereof." The same is true of the mortgage tax. Over fifteen times the mortgage tax statute refers to the tax on the " principal indebtedness secured." (Tax Law, §§ 250–257.) If the secured debts tax computed on principal indebtedness is not paid the owner " shall be assessed upon such secured debt in the

taxing district in which he resides " (§ 336), and such local tax was and is always on the principal only of the debt.

A general exemption from every conceivable tax does not follow where a system of taxation is substituted in place of " other " taxation, even though the exemption statute declares that the new tax "shall be in lieu of all other taxation." In *Shelby County* v. *Union & Planters Bank,* 161 U. S. 149, a State tax was laid under the bank's charter " at one-half of one per cent. on each share of capital stock which shall be in lieu of all other taxes." Having investigated the history and purpose of this statute the court concluded immediately that the exemption applied to the shares in the hands of the shareholders, leaving taxable the capital stock of the corporation, its surplus and accumulated profits in any way the State saw fit:

> " The charter tax was laid upon the shares of stock in the hands of the stockholders, the exemption from further taxation *applies to the subject which was taxed* under the charter, *and is not of any greater scope,* and would not, therefore, include the exemption from taxation of either the capital stock or surplus which is the property of the corporation itself."

The subject which is taxed by the mortgage tax and the secured debts tax of New York State is the principal indebtedness. If all the principal indebtedness is not taxed, as in the case of a mortgage covering property both within and without the State, the exemption applies only to the extent the mortgage has been taxed by this State.

(*People ex rel. Braeburn Association* v. *Hanking,* 154 App. Div. 679.)

In *State* v. *Hinkel,* 116 N. W. (Wis.) 639, a license tax upon corporations contained the exemption that "the payment of such license and percentage shall be in lieu of all taxes for any purposes authorized by the laws of this State." Nevertheless, considered in connection with a former statute exempting from taxation stock in a corporation which is required to pay taxes upon its property in the same manner as individuals, it was held that the corporate stock of the corporation, since not taxable on an *ad valorem* basis like the property of individuals, was still taxable to the owners thereof.

When the *Interborough* franchise tax case was before this court (237 U. S. 276, 284), an exemption from taxation of a person constructing and operating the subway was refused enlargement so as to include the operation of the subway by a corporation.

> "Scrutinizing it in that way the Court of Appeals observed that the exemption was from taxation in respect of the person's or corporation's interest under the contract. However probable and expected it may have been that a corporation would run the road, it was left possible for a natural person to do it, as in fact an individual took and held the first contract for two years. The exemption applied to one to the same extent as to the other — for either would have the same interest under the contract as the other. The right to be a corporation, even when the cor-

poration was created and was expected to be created to carry out the purposes of the act, was not an interest under the contract, but only a very great convenience for acquiring and using that interest. For these reasons the Court of Appeals held that that right might be taxed. *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 558, 559.

"The construction of the statute by the Court of Appeals although not conclusive upon its meaning as a contract is entitled to great deference and respect. As a literal interpretation it is undeniably correct and we should not feel warranted in overruling it *because of a certain perfume of general exemption.*"

In conclusion, all depends upon the purpose of the legislation, so much more than upon the isolated words of exemption. We have before the court (1) a failure for years to collect locally a tax on personal property in the form of mortgages and secured debts, a tax computed on the face value thereof; (2) a plan to have owners bring forth their securities ;(3) a new and smaller tax at one-half of one per cent. on the face value rather than a tax anywhere from 2 per cent. to 5 per cent. laid by the local assessors when property of this nature was discovered; (4) a promise of exemption from "other" taxation or "all" taxation in the localities, and (5) a computation of the new tax on the same basis as the old, namely, on the face value or principal indebtedness secured.

The principal was exempted. The interest was not.

POINT II.

Taxing the income is not taxing the principal.

Opposing counsel for the plaintiff in error devote their Point V to a discussion of the *Pollock case* (157 U. S. 429; 158 U. S. 601).

As our State court has said in the only opinion written concerning the questions now under discussion, the *Pollock case* would be of importance if there were a constitutional prohibition against taxation of the principal of mortgages and secured debts:

> "We are not unmindful that it has been held that a tax on income is in reality a tax on the property producing the income (*Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 581; 158 id. 601; *Hancock* v. *Singer Manufacturing Company*, 62 N. J. L. 289, 342; *Opinion of the Justices*, 220 Mass. 613, 623). That might be important in reference to some questions, as for instance if we are considering the legality of a tax on income, there being a constitutional prohibition against such tax on the principal. Our problem here, however, is one of statutory construction and to ascertain the legislative intent, and in a problem of that nature we are not hampered by constitutional restrictions."

And this court has stated the same view in *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505:

> "It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the

States are to exist and make laws. *New York, New Haven & Hartford R. R. Co.* v. *New York*, 165 U. S. 628; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616. The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. *Williams* v. *Talladega*, 226 U. S. 404, 416, 417, 419. *Johnson* v. *Maryland*, 254 U. S. 51, 55.

* * * * * * *

"In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601; a rule lately illustrated by *Evans* v. *Gore*, 253 U. S. 245."

The principal of secured debts and of mortgages had never been exempt by constitution or by any previous exercise of legislative power. The Legislatures of 1906 and 1911, which were the authors of all exemptions if any were to be granted by the Mortgage Tax Law and by the Secured Debts Tax Law, could exempt the principal from taxation altogether or partially, or the Legislature could combine principal and interest in the exemption. We find no mention of interest. Let the Legislature put it there, and not the relator, who under these laws pays a tax only on the principal of the investment.

POINT III.

Assuming the exemption covered interest, the contract is not violated by the requirements of the Personal Income Tax Law of New York State.

The Income Tax Law does not impose a tax on *interest*. It imposes a personal tax *on every resident*, measured by his *net income*. And net income is computed from gross income. Net income is the measure, not the subject of the tax. And gross income is only an element in the computation of net income. The fact that interest is one of many elements of gross income, which in turn is but an element of net income, does not make a tax *measured* by net income a tax on interest. The measure of a tax does not become the thing taxed. A mortgage tax measured (under Sec. 256) by the land covered by the mortgage is not a tax on the land. A mortgage tax measured by the debt is not a tax on the debt (*Peo. ex rel. U. S. Title Guaranty Co.* v. *Tax Comm.*, 230 N. Y. 102). And gross income is only one element in the measure of the income tax. And interest is only one part of that element.

The jurisdiction of the State to compel a resident to include as an item of gross income the interest upon his secured debts is a personal jurisdiction. It exists because of the residence of the taxpayer within the State. No effort is made to exercise a similar jurisdiction over non-residents, even though they keep their securities within the State, or the debtors be subject to the jurisdiction of New York.

To the extent, at least, that it reaches interest on intangibles, the New York Income Tax is a personal tax, and not a property tax. It must be

enforced *in personam* rather than *in rem*. Certainly one paying under the former Secured Debt Tax Law cannot pretend to have purchased a personal exemption — an exemption from personal taxation which might be conceived in the future.

It is a far cry from the exemption of interest (which constitutes one factor in gross income, which constitutes, in turn, but one factor in the computation of net income, which net income is the measure of personal tax) to the exemption of the person.

I, therefore, submit that, even if the Secured Debts Tax Law did exempt the interest of the debts, and result in a contract, the Income Tax Law does not violate the exemption nor impair the obligation of the contract.

The final order of the Supreme Court of the State of New York should be affirmed with costs.

Respectfully submitted,

CARL SHERMAN,

Attorney-General of the State of New York,

Attorney for Defendants in Error, Capitol, Albany, N. Y.

C. T. DAWES,
JAMES S. Y. IVINS,
FRANCIS W. CULLEN,
Counsel.

APPENDIX

[197 App. Div. 131]

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CENTRAL UNION TRUST COMPANY OF NEW YORK, Trustee of the Estate of MARCIA ANN GAVIT, Relator, *v.* JAMES A. WENDELL, as Comptroller of the State of New York, Respondent.

Third Department, May 4, 1921.

Taxation — income tax — interest on real property mortgage on which recording tax paid is part of mortgagee's taxable income—Tax Law, § 251, exempting mortgages on which recording tax paid from State and local taxation, does not exempt interest from income tax — nature of income tax.

The interest on real property mortgages on which the recording tax has been paid is one of the elements in determining the taxable income of the mortgagee.

Section 251 of the Tax Law, which provides that all mortgages of real property on which the recording tax has been paid, and the debts and obligations, which they secure, shall be exempt from taxation by the State and the local subdivisions thereof, does not exempt the interest on such mortgages from the income tax.

The income tax is a tax on the individual, and his income is used only in fixing the measure of the tax. It is not imposed directly on any particular income, and the income from a particular source is but one element to be considered in connection with other elements in determining the measure of taxation which is to be imposed on the individual.

JOHN M. KELLOGG, P. J., dissents, with opinion.

CERTIORARI issued out of the Supreme Court and attested on the 12th day of February, 1921, directed to James A. Wendell, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings had in adjusting an account for income taxes for the taxable year of 1919 against the petitioner under article 16 of the Tax Law, and in revising said account.

Larkin, Rathbone & Perry [*Hersey Egginton, John M. Perry* and *Stewart M. Seymour* of counsel], for the relator.

Charles D. Newton, Atotrney-General [*James S. Y. Ivins, Deputy Attorney-General,* of counsel], for the respondent.

COCHRANE, J.:

The estate represented by the relator was the owner of certain real estate mortgages on which the recording tax required by section 253 of the Tax Law had been duly paid. Section 251 of that law provides as follows: " All mortgages of real property situated within the State which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the State, counties, cities, towns, villages, school districts and other local subdivisions of the State," except as therein provided which is not here material. The relator contends that the interest on such mortgages may not be considered for the purpose of ascertaining

the " net income " constituting the basis of the income tax imposed by section 351 of the Tax Law. The Comptroller has included such interest as one of the elements in determining such " net income " of the relator and has assessed the income tax against the relator on the basis thereof. The purpose of this proceeding is to test the propriety of the position taken by the Comptroller.

The action of the Comptroller is clearly within the provisions of the Tax Law (§§ 351, 352, 357, 359, as added by Laws of 1919, chap. 627), relating to the imposition of income taxes, and known as the Income Tax Law. The principal contention of the relator is that section 251 of the Tax Law (as amd. by Laws of 1916, chap. 323, and Laws of 1917, chap. 485), which with correlated sections is in article 11, known as the Mortgage Tax Law, was in effect a contract between the State and mortgage investors that the latter on payment of the recording tax imposed by section 253 of the Tax Law (as amd. by Laws of 1916, chap. 323) should be exempt from all other taxation in respect to such mortgages and that the provisions of the so-called Income Tax Law requiring the interest on such mortgages to be considered in fixing the net income with respect to which the income tax is imposed is inconsistent with said section 251 and consequently impairs the obligation of the State's contract with such mortgagees. For the purposes of this discussion it may be assumed without so deciding that the purpose of section 251 was to encourage mortgage investments and that it possesses the characteristics of a contract between the State and mortgagees who have made their investments prior to

the enactment of the income tax provisions of the law. It does not follow, however, that the interest earned by such mortgages was within the purview of such contract so as to be exempt from other taxation. It is true that as between the parties to a mortgage the interest thereon is an incident of the principal and like the latter is controlled by the mortgage provisions. But in considering what is exempt from taxation the rule is that such alleged exemption must be "described in clear and unambiguous language, and appear to be undisputably within the intention of the Legislature." (*People ex rel. Westchester Fire Ins. Co.* v. *Davenport*, 91 N. Y. 574, 586.) In *Yazoo & Mississippi Valley R. Co.* v. *Adams* (180 U. S. 1, 22) it was said: "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the Legislature. * * * And while, as we have held in many cases, Legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies." In *Chicago, Burlington & Kansas City R. R.* v. *Guffey* (120 U. S. 569, 575) the rule was declared in these words: "It is the settled doctrine of this court that an immunity from taxation by the State will not be recognized unless granted in terms too plain to be mistaken." In

the light of the foregoing rule the purpose of the Legislature in enacting the recording tax provisions of the law must be ascertained. Likewise such purpose can only be intelligently ascertained by reference to conditions then existing. Mortgages were subject to assessment by the local assessors. Only the principal of such mortgages was included in the assessment roll. Interest thereon played no part in the system of taxation then in vogue. Clearly the dominant idea in the mind of the Legislature was to render mortgagees independent of the action, capricious or otherwise of local tax officials. It is true that the State was included in the prohibition against taxing recorded mortgages, but that the controlling purpose was as above indicated is manifested by the detailed enumeration of the subdivisions of the State from the activities of which such mortgagees were rendered immune. " Counties, cities, towns, villages, school districts and other local subdivisions of the State " were each specifically named as being deprived of the right to exercise any of their taxing powers in respect to such mortgagees. The phraseology of the section emphasizes the idea that it was such particular kind of taxation as then existed against which relief was being granted. Otherwise there was no occasion for specifying the various subdivisions of the State. Such idea is further emphasized by the title of said section 251: "*Exemption from local taxation.*" Again, section 253 carefully confines the rate of taxation to the " principal debt or obligation." That is all which in any event was the subject of taxation at the time of that legislation. Interest as such was not

taxable. And when in section 251 it was declared that all mortgages "*taxed by this article*" should be exempt the reasonable construction thereof is that it was only the "principal debt or obligation" constituting the basis of taxation thereof as stated in section 253 which was intended to be exempt. Such interpretation is clearly within the rule of strict construction as declared in the authorities above cited. That there is at least a doubt as to whether the taxability of interest was within the legislative mind is, we think, reasonably clear. All doubts and ambiguities, however, must be resolved in favor of the taxing power. We think that sections 251 and 253, construed in the light of conditions existing at the time of their enactment and with reference to the manifest purpose of their enactment disclose an intent to deal only with such taxation and such methods of taxation as were then prevalent and have no reference to the income derived from such mortgages. There was no occasion to take into account such income or to legislate in reference thereto for the reason that it was not then taxable. Furthermore, it cannot be assumed that the Legislature intended to barter away its taxing powers and every mortgagee must have known that by the mere payment of the recording tax he was not rendered immune from all other taxation in the future should the general interest of the community or the public exigencies so require. (*People ex rel. Iroquois Door Co.* v. *Knapp*, 186 App. Div. 172, 175; affd., 227 N. Y. 592; *People ex rel. Gallatin National Bank* v. *Commissioners*, 67 id. 516; *People ex rel. Cunningham* v. *Roper*, 35 id. 629, 635.) The possibility of the enactment

of an income tax many years in the future did not exist in the minds of the legislators at the time they enacted the recording tax provisions. Those provisions and the exemption created thereby had no reference to an entirely distinct system of taxation at some time in the future such as is created by the income tax provisions. We are not unmindful that it has been held that a tax on income is in reality a tax on the property producing the income. (*Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 581; 158 id. 601; *Hancock* v. *Singer Manufacturing Company*, 62 N. J. L. 289, 342; *Opinion of the Justices*, 220 Mass. 613, 623.) That might be important in reference to some questions, as for instance if we were considering the legality of a tax on income, there being a constitutional prohibition against such tax on the principal. Our problem here, however, is one of statutory construction and to ascertain the legislative intent, and in a problem of that nature we are not hampered by constitutional restrictions. In our view of sections 251 and 253 of the Tax Law it is as if the Legislature had said, there shall be no other tax on the principal of mortgages except the recording tax, but we reserve the right to impose in the future should circumstances require a tax on the income of such mortgages. If we have properly construed such legislation, the validity of the tax in question necessarily follows.

There is still another view to take of this question. The income tax is not directly at least imposed on any particular income. The recording tax is imposed on the mortgage (§ 253); the income tax is a tax on the individual. It is " im-

posed upon every resident of the State " (§ 351). His income is used only in fixing the measure of such tax. It is the " net income " on which the tax is computed (§ 351). The " net income " means the " gross income " of the taxpayer less legal deductions (§ 357) and in determining the " gross income " mortgage interest as well as all other income is included with numerous exceptions specified in section 359. From such " gross income " thus determined are to be subtracted numerous deductions (§ 360) and also certain exemptions (§ 362) before the tax is computed. Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual. In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage. That is merely a factor in the determination of the amount of such taxation. We think, therefore, for the reasons stated that the contention of the relator cannot be sustained.

The determination should be confirmed, with fifty dollars costs and disbursements.

All concur, except JOHN M. KELLOGG, P. J., dissenting, with an opinion.

Office Supreme Court, U. S.
FILED
MAR 22 1923
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 318.

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of EMELINE F. CLYDE,
Plaintiff-in-Error,

against

JOHN F. GILCHRIST, President, JOHN J. MERRILL and MARK GRAVES, constituting the State Tax Commission of the State of New York,
Defendants-in-Error.

APPENDICES

referred to in accompanying brief of Plaintiff-in-Error containing

Relevant portions of Laws of State of New York involved.

CULLEN and DYKMAN,
Attorneys for Plaintiff-in-Error,
177 Montague Street,
Brooklyn, N. Y.

ARTHUR E. GODDARD,
Of Counsel.

Stillman Appellate Printing Co.

INDEX OF APPENDICES

PAGE

Appendices 1-55

Appendix A—Abstract (with copy of all relevant portions) of New York Income Tax Law, being Article 16 of New York Tax Law, added by Chapter 627, Laws of 1919, with amendments of 1920 where applicable to year 1919..... 1-18

Appendix B—Abstract (with copies of all relevant portions) of the New York Mortgage Recording Tax Law, being Article 11 of the New York Tax Law, as it existed prior to the enactment of the New York State Income Tax Law..... 19-38

Appendix C—Copy of New York Tax Law on secured debts, being Article 15 of New York Tax Law, added by Chapter 802 of the Laws of 1911... 39-43

Appendix D--Copies of opinions of the Appellate Division of the State of New York for the Third Judicial Department in the case of The People of the State of New York *ex rel.* Central Union Trust Company of New York, Trustee of the Estate of Marcia Ann Gavit, Relator, vs. James A. Wendell, as Comptroller of the State of New York, Respondent (197 App. Div., p. 131)..... 45-55

INDEX OF BRIEF

in accompanying volume.

PAGE

Statement 1-10

Errors Relied Upon 10-13

Point I—The Federal question was properly raised in the State Courts..... 14

Point II—The State of New York may effectively contract for an exemption from future taxation 15-18

Point III—The exemption of secured debts in this case was granted by contract for a valuable consideration and is irrevocable 18-24

Point IV—The exemption of mortgage bonds in this case was likewise granted by contract for a valuable consideration, and is irrevocable..... 24-29

Point V—The exemption from taxation of both secured debts and mortgage bonds was sufficiently broad and definite to preclude a tax upon the income therefrom 29-42

PAGE

Point VI—The unconstitutional features of the New York Income Tax Law, which form the subject matter of this case, are readily severable..... 42-43

Point VII—The final order of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department should be reversed, upon the ground that the determination of the Comptroller of the State of New York, confirmed by such order, was erroneous and illegal in so far as an income tax was imposed by such determination upon the plaintiff-in-error with respect to her income from the mortgage bonds and Secured Debts involved in this case, and the case should be remitted for further proceedings by the Appellate Division in conformity with such reversal 43

APPENDIX A.

Abstract (with copy of all relevant portions) of New York Income Tax Law, being Article 16 of New York Tax Law, added by Laws 1919, Chapter 627, with amendments of 1920 where applicable to year 1919.

APPENDIX A.

Abstract (with copy of all relevant portions) of New York Income Tax Law, being Article 16 of New York Tax Law, added by Laws 1919, Chapter 627, with amendments of 1920 where applicable to year 1919.

APPENDIX A.

ABSTRACT (WITH COPY OF ALL RELEVANT PORTIONS) OF NEW YORK INCOME TAX LAW

BEING ARTICLE 16 OF NEW YORK TAX LAW

ADDED BY LAWS 1919, CHAPTER 627

WITH AMENDMENTS OF 1920 WHERE APPLICABLE TO YEAR 1919.

ARTICLE 16.

TAXES UPON AND WITH RESPECT TO PERSONAL INCOMES.

§350. *Definitions.* For the purpose of this article and unless otherwise required by the context:

(1) (Definition of "Comptroller"—unimportant).

(2) The word "taxpayer" includes any person, trust or estate subject to a tax imposed by this article, or whose income is in whole or in part subject to a tax imposed by this article, and does not include corporations.

(3) (Definition of "Military or naval forces of the United States"—unimportant).

(4) (Definition of "Taxable Year"—unimportant).

(5) (Definition of "Fiduciary"—unimportant).

(6) (Definition of "Paid", "Received", etc.—unimportant).

(7) The word "Resident" applies only to natural persons and includes, for the purpose of determining liability to the tax imposed by this article upon or with reference to the income of any taxable year, commencing with the year nineteen hundred and nineteen, any person who shall, at any time during the last six months of the calendar year, be a resident of the state.

(8) (Definition of "Dividend'—unimportant).

(9) (Definition of "Foreign Country," etc.—unimportant).

(10) (Definition of "Withholding Agent"—unimportant).

§351. *Imposition of income tax.* A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars, but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income

as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, or for any taxable year ending during the year nineteen hundred and nineteen.

§351-a. *Reimposition of tax against non-residents.* (This section, which is unimportant in this case, was made necessary by the decision of this Court in the case of *Travis vs. Yale & Towne Mfg. Co.* (252 U. S., 60) holding the provisions of the original act unconstitutional with respect to non-residents).

§351-b. *Tax a debt.* Every tax imposed by this article, and all increases, interest and penalties thereon, in addition to being a tax against property, business, trade, profession or occupation, as in this article provided, shall also become, from the time it is due and payable, a personal debt, from the person or persons liable to pay the same, to the State of New York.

§352. *Exemption of certain personal property from taxation.* The taxes imposed by this article are in addition to all other taxes imposed by law, except that money on hand, on deposit or at interest, bonds, notes and choses in action and shares of stock in corporations

other than banks and banking associations, owned by any individual or constituting a part of a trust or estate subject to the income tax imposed by this article, and from which any income is derived, shall not after July thirty-first, nineteen hundred and nineteen, be included in the valuation of the personal property included in the assessment-roll of the several tax districts, villages, school districts and special tax districts of the state.

§353. *Ascertainment of gain and loss.* (This section has to do with the determination of gains or losses arising from the sale or other disposition of property—unimportant).

§354. *Exchange of property*—(unimportant).

§355. *Gain through exchange*—(unimportant).

§356. *Inventory*—(unimportant).

§357. *Net income defined.* The term "net income" means the gross income of a taxpayer less the deductions allowed by this article.

§358. *Computation of net income.* (This section has to do only with calendar and fiscal years—unimportant).

§359. *Gross income defined.* The term "gross income":

1. Includes gains, profits and income derived from salaries, wages or compensation for personal

services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but

2. Does not include the following items which shall be exempt from taxation under this article:

a. The proceeds of life insurance policies and contracts paid upon the death of the insured to individual beneficiaries or to the estate of the insured.

b. The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract.

c. The value of property acquired by gift, bequests, devise or descent (but the income from such property shall be included in gross income).

d. Interest upon the obligations of the United States or its possessions; or securities issued un-

der the provisions of the federal farm loan act of July seventeen, nineteen hundred and sixteen; or bonds issued by the war finance corporation; or the obligations of the State of New York or of any municipal corporation or political subdivision thereof; or investments upon which the tax provided for in section three hundred and thirty-one of this chapter has heretofore been paid since June first, nineteen hundred and seventeen, during the period of years for which such tax shall have been paid.

e. Any amount received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

f. Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States.

g. Income received by any officer of a religious denomination or by any institution, or trust, for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, if such income be used exclusively for carrying out

one or more of such purposes; but nothing herein shall be construed to exempt the fees, stipends, personal earnings or other private income of such officer or trustee.

3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article.

§360. *Deductions.* In computing net income there shall be allowed as deductions:

1. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

2. In the case of a resident of the state such a proportion of the total interest paid or accrued during the taxable year on indebtedness, as the net income of the taxpayer taxable under this

article bears to his total income from all sources; or in case of an individual not a resident of the state, the same proportion of interest paid or accrued within the taxable year on indebtedness which the amount of such gross income, as herein defined, bears to the gross amount of his income from all sources within and without the state.

3. Taxes other than income taxes paid or accrued within the taxable year imposed, first by the authority of the United States, or of any of its possessions, or, second, by the authority of any state, or territory, or any county, school district, municipality, or other taxing subdivision of any state or territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed, or, third, by the authority of any foreign government.

4. Losses sustained during the taxable year, and not compensated for by insurance or otherwise, if incurred in trade or business.

5. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only as to such transactions within the state.

6. Losses sustained during the taxable year of property not connected with the trade or business (but, in the case of a taxpayer other than a resident, only of property within the state) if arising from fires, storms, shipwrecks, or other casualty

or from theft, and not compensated for by insurance or otherwise.

7. Debts ascertained to be worthless and charged off within the taxable year.

8. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business including a reasonable allowance for obsolescence.

9. In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted; provided, that in the case of such properties acquired prior to January first, nineteen hundred and nineteen, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date; provided, further, that in the case of mines, oil and gas wells, discovered by the taxpayer on or after January first, nineteen hundred and nineteen, and not acquired as the result of a purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the comptroller. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

10. Contributions or gifts made within the taxable year to corporations incorporated by, or associations organized under, the laws of this state and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by section seven of the act of congress known as the vocational rehabilitation act, to an amount not in excess of fifteen per centum of the taxpayer's net income as computed without the benefits of this subdivision. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the comptroller. In the case of a taxpayer other than a resident of the state this deduction shall be allowed only as to contributions or gifts made to corporations or associations incorporated by or organized under the laws of this state or to the vocational rehabilitation fund above mentioned.

11. In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations to be prescribed by the comptroller.

§361. *Items not deductible.* In computing net income no deduction shall in any case be allowed in respect of:

1. Personal, living, or family expenses;

2. Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

3. Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or

4. Premiums paid on any life insurance policy, covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

§362. *Exemptions.* The following exemptions shall be allowed to any resident taxpayer:

1. In the case of a single person, a personal exemption of one thousand dollars, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of two thousand dollars. A husband and wife living together shall receive but one personal exemption of two thousand dollars against their aggregate net income; and in case they make separate returns, the personal exemption of two thousand dol-

lars may be taken by either or divided between them.

2. Two hundred dollars for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer, if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

3. A taxpayer receiving salary, wages, or other compensation from the United States as an official thereof, exempt from taxation under this article, shall be entitled to only so much of the personal exemption provided for in this section, as is in excess of the aggregate amount of such salaries, wages, or other compensation.

This section was amended by Laws of 1920, Chapters 58 and 191, so as to extend to non-residents the same exemptions as residents, in order to comply with the decision of this Court in the case of *Travis vs. Yale & Towne Mfg. Co.* (252 U. S., 60) : Subdivision 3 was stricken out by the amendment of 1920, apparently for constitutional reasons.

§363. *Credit for Taxes in case of taxpayers other than residents of the state*—(unimportant).

§364. *Partnerships*—(unimportant).

§365. *Estates and Trusts*—(unimportant).

§366. *Information and payment at source*—(unimportant).

§367. *Taxpayers' returns*—(unimportant).

§368. *Partnership returns*—(unimportant).

§369. *Fiduciary returns*—(unimportant).

§370. *Returns when accounting period changed*—(unimportant).

§371. *Time and place of filing returns*—(unimportant).

§372. *Administration of income tax law.* The comptroller shall administer and enforce the tax herein imposed, for which purpose he may divide the state into districts in each of which a branch office of the comptroller may be maintained; provided that in no cases shall a county be divided in forming a district.

§373. *Powers of comptroller.* If in the opinion of the comptroller any return of a taxpayer is in any essential respect incorrect he shall have power to revise such return, or if any taxpayer fails to make return as herein required, the comptroller is authorized to make an estimate of the taxable income of such taxpayer from any information in his possession, and to audit and state an account according to such revised return or the estimate so made by him for the taxes, penalties and interest due the state from such taxpayer. The comptroller shall also have power to examine or cause to have examined, in case of failure to report the books and records of any such taxpayer, and may take testimony and require proof material for his information. (This sec-

tion and other sections providing for the administration of the Income Tax Law was amended in 1921 so as to vest all the powers and duties of the comptroller in the newly created State Tax Commission, the members of which have been substituted in this case as defendants-in-error in place of the comptroller.)

§374. *Revision and readjustment of accounts by comptroller.* If an application for revision be filed with the comptroller by a taxpayer within one year from the time of the filing of the return, or if the tax of such taxpayer shall have been recomputed, then from the time of such recomputation, the comptroller shall grant a hearing thereon and if it shall be made to appear, upon any such hearing by evidence submitted to him or otherwise, that any such computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the comptroller shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of his determination thereon to the taxpayer. (The State Tax Commission was substituted for the comptroller by the amendment of 1921.)

§375. *Review of determination of comptroller by certiorari and regulations as to writ.* The determination of the comptroller upon any

application made to him by any taxpayer for revision and resettlement of any computation of tax, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter. No certiorari to review any statement of a computation or any determination by the comptroller under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the comptroller of the application for such writ. Before making the application an undertaking must be filed with him, in such amount and with such sureties as a Justice of the Supreme Court shall approve, to the effect that if such writ is dismissed or the determination of the comptroller affirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the writ, including costs of all appeals. (The State Tax Commission was substituted for the comptroller by the amendment of 1921.)

§376. *Penalties*—(unimportant).

§377. *When payable*—(unimportant).

§378. *Notice of assessment*—(unimportant—repealed 1920).

§379. *Collection of taxes; penalties and interest*—(unimportant).

§380. *Warrant for collection of taxes*—(unimportant).

§381. *Action for recovery of taxes*—(unimportant).

§382. *Distribution of income tax.* Of the revenue collected under this article the comptroller shall retain in his hands sufficient to provide at all times a fund in his hands in the sum of two hundred and fifty thousand dollars out of which he shall pay any refunds to which taxpayers shall be entitled under the provisions of this article. Of the remainder, fifty per centum shall be paid into the state treasury to the credit of the general fund. The remaining fifty per centum thereof shall, not later than the first day of July, and in case of moneys subsequently collected at least quarterly thereafter, be distributed and paid to the treasurers of the several counties of the state, in the proportion that the assessed valuation of the real property of each county bears to the aggregate assessed valuation of the real property of the state. As to any county included in the City of New York such payment shall be made to the receiver of taxes in such city and be paid into the general fund for the reduction of taxation of the City of New York. The county treasurer shall apportion the amount so received among the several towns and cities within the county in proportion that the assessed valuation of the real property of each town or city bears to the aggregate as-

sessed valuation of the real property of the county, and shall credit the amount apportioned to each town against the county tax payable by it, and shall pay the amount apportioned to each city to the chief fiscal officer of the city to be paid into the general fund for city purposes. If the amount of the credit to a town exceeds the county tax from such town, the excess shall be paid to the supervisor of the town and be by him credited to general town purposes. (This section was amended by the Laws of 1920-1921 in unimportant respects: The State Tax Commission was substituted for the comptroller by the amendment of 1921.)

§383. *Comptroller to make regulations and to collect facts*—(unimportant; State Tax Commission substituted for comptroller by the amendment of 1921).

§384. *Secrecy required of official; penalty for violation*—(unimportant).

§385. *Contract to assume income tax illegal.* It shall be unlawful for any person to agree or contract directly or indirectly to pay or assume or bear the burden of any tax payable by any taxpayer under the provisions of this article. Any such contract or agreement shall be null and void and shall not be enforced or given effect by any court.

§2. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction

to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§3. An assessment on account of personal property made prior to August first, nineteen hundred and nineteen, shall be as valid and effectual as if this act had not been passed, and nothing in this act shall be construed to impair the obligation to pay taxes assessed on account of personal property in the year nineteen hundred and eighteen or the year nineteen hundred and nineteen prior to August first whether payable in that year or not.

§4. (Revision of budgets in cities, etc.—unimportant).

§5. (Appropriation for administration expenses, etc.—unimportant).

§6. Except as otherwise provided herein this act shall take effect immediately.

APPENDIX B.

Abstract (with copies of all relevant portions) of the New York Mortgage Recording Tax Law. being Article 11 of the New York Tax Law. as it existed prior to the enactment of the New York State Income Tax Law.

APPENDIX B.

Abstract (with copies of all relevant portions) of the New York Mortgage Recording Tax Law

Being Article 11 of The New York Tax Law

as it existed prior to the enactment of the New York State Income Tax Law.

ARTICLE 11.

Tax on Mortgages.

§250. *Definitions.* The term "real property" as used in this article, in addition to the definition thereof contained in section two of this chapter, includes everything a conveyance or mortgage of which can be recorded as a conveyance or mortgage of real property under the laws of the state. The term "mortgage" as used in this article includes every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby. Executory contracts for the sale of real property under which the vendee has or is entitled to possession shall be deemed to be mortgages for the purposes of this article and shall be taxable at the amount unpaid on such contracts. A contract or agreement by which the indebtedness secured by any mortgage is increased or added to, shall be deemed a mort-

gage of real property for the purpose of this article, and shall be taxable as such upon the amount of such increase or addition.

§251. *Exemptions from local taxation.* All mortgages of real property situated within the state which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the state, counties, cities, towns, villages, school districts and other local subdivisions of the state, except that such mortgage shall not be exempt from the taxes imposed by sections twenty-four to twenty-four-g, both inclusive, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine and article ten of this chapter.

§252. *Exemptions.* No mortgage of real property situated within this state shall be exempt, and no person or corporation owning any debt or obligation secured by mortgage of real property situated within this state shall be exempt, from the taxes imposed by this article by reason of anything contained in any other statute, or by reason of any provision in any private act or charter which is subject to amendment or repeal by the legislature, or by reason of non-residence within this state or for any other cause.

§253. *Recording tax.* A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt

or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day of July, nineteen hundred and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article.

§254. *Optional tax on prior mortgages.* Whenever any mortgage other than a mortgage specified in section two hundred and sixty-four has been recorded prior to July first, nineteen hundred and six, the record owner thereof may file with the recording officer of the county in which the real property, or any part thereof, on which said mortgage is a lien, is situated, a written statement under oath verified by the record owner or the agent or officer of such record owner describing such mortgage by giving the date of the same and the liber and page of the record thereof together with the names of the parties thereto, specifying the amount then remaining unpaid on the debt or obligation secured thereby, and electing that it shall become subject to the tax

prescribed by section two hundred and fifty-three of this chapter. Whenever any unrecorded mortgage has been executed and delivered prior to July first, nineteen hundred and six, the owner thereof may record the same upon filing with the recording officer a similar statement and paying the tax as herein prescribed. A tax shall thereupon be computed, levied and collected upon the amount of the principal debt or obligation unpaid at the time of the filing of such statement, or of the recording of such mortgage and filing of such statement. On the payment of such tax as herein provided, the recording officer shall note on the margin of the record of such mortgage the fact of such statement and of the amount of the tax paid, attested by his signature, whereupon such mortgage and the debt or obligation secured thereby shall be entitled to the exemptions and immunities conferred by this article, and all of the provisions of this article shall thereafter be applicable to said mortgage. Whenever the original mortgage is presented to the clerk together with the statement he shall also note on said original mortgage the fact of the filing of the said statement and also the amount of the tax paid duly attested by his signature, which indorsement shall be conclusive evidence of the payment of such tax.

§255. *Supplemental mortgage.* If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or

mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article, unless it creates or secures a new and further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided by section two hundred and fifty-three of this chapter on such new or further indebtedness or obligation, and shall be paid to the proper recording officer at the time such instrument or additional mortgage is recorded. If at the time of recording such instrument, or additional mortgage any exemption is claimed under this section, there shall be filed with the recording officer and preserved in his office a statement under oath of the facts on which such claim for exemption is based. The determination of the recording officer upon the question of exemption shall be reviewable by the tax commission.

§256. *Mortgages for indefinite amounts or for contract obligations.* (Unimportant.)

§257. *Payment of taxes.* The taxes imposed by this article shall be payable on the recording of each mortgage of real property subject to taxes thereunder. Such taxes shall be paid to the recording officer of any country in which the real property or any part thereof is situated. It shall be the duty of such recording officer to indorse upon each mortgage a receipt for the amount of the tax so paid. Any mortgage so indorsed may thereupon or thereafter be recorded by any recording officer and the receipt for such tax indorsed upon each mortgage shall be recorded therewith. The record of such receipt shall be conclusive proof that the amount of tax stated therein has been paid upon such mortgage.

§258. *Effect of non-payment of taxes.* No mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the tax imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article. No judgment or final order in any action or proceeding shall be made for the foreclosure or the enforcement of any mortgage which is subject to the tax imposed by this article or of any debt or obligation secured by any such

mortgage, unless the taxes imposed by this article shall have been paid as provided in this article; and whenever it shall appear that any mortgage has been recorded or that any advance has been made on a prior advance mortgage or on a corporate trust mortgage without payment of the tax imposed by this article there shall be paid in addition to the amount of the tax a sum equal to one per centum thereof for each month the tax remains unpaid, which sum shall be added to the tax and paid or collected therewith.

§259. *Trust mortgages.* In the case of mortgages made by corporations in trust to secure payment of bonds or obligations issued or to be issued thereafter, if the total amount of principal indebtedness which under any contingency may be advanced or accrue or which may become secured by any such mortgage which is subject to this article has not been advanced or accrued thereon or become secured thereby before such mortgage is recorded, it may contain at the end thereof a statement of the amount which at the time of the execution and delivery thereof has been advanced or accrued thereon, or which is then secured by such mortgage; thereupon the tax payable on the recording of the mortgage shall be computed on the basis of the amount so stated to have been so advanced or accrued thereon or which is stated to be secured thereby. Such statement shall thereafter at all times be binding upon and conclusive against the mortgagee,

the holders of any bonds or obligations secured by such mortgage and all persons claiming through the mortgagee any interest in the mortgage or in the mortgaged premises. Whenever a further amount is to be advanced under the original mortgage, or shall accrue thereon or become secured thereby, the corporation making such mortgage shall pay the tax on such amount at or before the time when such amount is to be advanced, accrues or becomes secured and shall at the time of paying such tax, file in the office of the recording officer where such mortgage has been or is first recorded and with the tax commission a statement, verified by the secretary, treasurer or other proper officer of said corporation of the amount of principal indebtedness to be so advanced, accruing or becoming secured, and the certification of any bond or bonds by the trust mortgagee shall be deemed an advance under this article. Such additional tax shall be paid to the recording officer where such mortgage has been or is first recorded and a receipt therefor shall be indorsed upon the mortgage and payment therefor shall be noted in the margin of the record of such mortgage and if requested a duplicate receipt for such payment shall also be given to the party paying such tax and the note of such payment or additional payment or such receipt shall have the same force and effect as the record of receipt of the tax which under this article is payable at or before the recording of the mortgage. If such additional tax

is not paid as required by this section, the trust mortgagee shall not certify any bond or other obligation issued on account thereof. The corporation making such mortgage or the owner of the property which secures the mortgage debt shall annually within thirty days after July first, and until it shall appear by such statement that the maximum amount of principal indebtedness secured by such mortgage has been advanced, has accrued or become secured and the tax thereon paid, file in the office of the tax commission and the recording officer where such mortgage has been or is first recorded a statement, verified by the secretary, treasurer or other proper officer of said corporation, showing:

1. The name of the mortgagor and the mortgagee;

2. The date of the mortgage and the county where first recorded;

3. The maximum amount of principal debt or obligation which under any contingency may be secured by such mortgage;

4. The amount advanced on such mortgage during the year ending June thirtieth preceding, with the date and the amount of each advancement;

5. In the case of a mortgage recorded prior to July first, nineteen hundred and six, the first annual statement filed under this section as hereby amended, shall state the total amount

advanced prior to July first, nineteen hundred and six, and the date and the amount of each subsequent advancement to the end of the period covered by the statement.

A failure to file any statement required by this section within the specified time shall subject the corporation or other person required to file such statement to a penalty of not less than one dollar nor more than one hundred dollars for each one thousand dollars of the maximum amount of principal indebtedness which is or under any contingency may become secured by the mortgage, which penalty in the aggregate shall not exceed the sum of five thousand dollars, recoverable by the attorney-general in an action brought in the name of the people of the State of New York.

§260. *Determination and apportionment by the State Tax Commission.* (This section deals with the cases of mortgaged property lying in more than one tax district, and is unimportant.)

§261. *Payment over and distribution of taxes.* Upon the first day of each month the recording officer of each county shall pay over to the county treasurer all moneys received during the preceding month upon account of taxes paid to him as herein prescribed, after deducting the necessary expenses of his office as provided in section two hundred and sixty-two, except taxes paid upon mortgages which under the provisions of section two hundred

and sixty are to be apportioned by the tax commission between several counties, which taxes and money shall be paid over by him as provided by the determination of said tax commission within five days after the filing of said determination in his office. The county treasurer of each county shall on the first day of January, April, July and October, in each year, after having deducted the necessary expenses of his office provided in section two hundred and sixty-two, transmit one-half of this net amount collected under the provisions of this article to the state treasurer and shall receive from the state treasurer, a receipt therefor countersigned by the comptroller. The remaining portion thereof in the counties of New York, Kings, Queens, Richmond and Bronx shall be paid into the general fund of the City of New York and be applied to the reduction of taxation, and in the other counties of the state the remaining portion shall be held by the respective county treasurers subject to the order of the board of supervisors as hereinafter provided. Prior to the first day of November in each year the recording officer shall cause to be prepared a statement containing a description of all mortgages upon which taxes have been paid by a reference to the date of each mortgage, the name of the mortgagor and mortgagee, the amount of the principal debt upon which the tax was paid together with the book and page where said mortgage is recorded, together with the tax district in which

the mortgaged property is situated, and if situated in two or more tax districts the amount apportioned to each tax district by the tax commission, and the amount deducted for his necessary expenses as approved by the tax commission and shall file the statement with the clerk of the board of supervisors and a copy thereof with the tax commission. The boards of supervisors of the several counties shall, on or before the fifteenth day of December in each year, ascertain from the statement filed with their clerk by the recording officer the location of the mortgaged property with respect to the several tax districts and the amount of tax property to be credited to each tax district which shall be applicable to the payment of state, county and city, or town expenses; except that where a town contains within its limits an incorporated village, or portion thereof, the supervisors shall apportion to the village or villages so much of the share credited to the said town as the assessed value of said village or portion thereof bears to twice the total assessed valuation of the town, and the remaining balance shall be applicable to the payment of state, county and town taxes. The board of supervisors of each county, on or before the fifteenth day of December each year, shall determine the respective sums applicable hereunder to each of the foregoing purposes and shall issue their warrant for the payment to the city treasurer or town supervisor, of the amount payable to said city or town, and their war-

rant for the payment to the village treasurer of the sum of money to which the village shall be entitled, which sum shall be credited to the general fund of the village.

§262. *Expenses of officers.* (Unimportant.)

§263. *Supervisory power of tax commission and comptroller.* (Unimportant.)

§264. *Tax on prior advance mortgages.* Whenever any part of the amount of the principal indebtedness which is or under any contingency may be secured by a mortgage recorded prior to July first, nineteen hundred and six, is advanced after July first, nineteen hundred and six, the tax prescribed by section two hundred and fifty-three of this article is hereby imposed on the amount of principal indebtedness so advanced, which tax shall be payable at the same time and in the same manner as taxes imposed by section two hundred and fifty-nine of this article, and all the provisions of section two hundred and fifty-nine in relation to the time and manner of paying such tax, the filing of statements in relation to the time and amount of such advances, and penalties for failure to file the same shall apply to advances made under this section and the payment of a tax thereon, except that if the mortgagor is not a corporation, such statements shall be filed by the owner of the mortgage, who, for failure to do so, shall be subject to the penalties prescribed by such section. In case said mortgage was given to

secure the payment of a series of bonds, the mortgagor may, at the time of paying such tax, present to the recording officer, the bonds representing the portion of the principal indebtedness secured by said mortgage upon which the tax is to be paid, and also file with said recording officer a statement verified by the mortgagor or an officer or duly authorized agent or attorney of the mortgagor specifying that said bonds, so presented, are the bonds representing that portion of the principal indebtedness secured by said mortgage upon which the tax is to be paid and that said bonds are secured by a mortgage recorded in said office stating the date of said mortgage and the liber and page of the record of the same. It shall be the duty of such recording officer to indorse upon each of said bonds, so presented to him, a statement signed by him to the effect that the tax imposed by this article on that portion of the principal indebtedness secured by said mortgage represented by said bonds has been paid, and said statement shall be conclusive proof of such payment. Notwithstanding the exception contained in section two hundred and fifty-four, the record owner of any mortgage recorded prior to July first, nineteen hundred and six, other than a corporate trust mortgage, may file in the office of the recording officer where such mortgage is first recorded a statement in form and substance as required by section two hundred and fifty-four of this article, except that it shall

specify and state the amount of all advancements made thereon prior to said date, giving the date and amount of each advancement and the amount of such prior advancements remaining unpaid, and thereby elect that the same be taxed under this article; and any mortgagor or mortgagee under a corporate trust mortgage given to secure a series of bonds or the owner of any such bond or bonds secured thereby may file in the office of the recording officer where such mortgage is first recorded a statement in form and substance as required by section two hundred and fifty-four of this article, except that it shall specify the serial number, the date and amount of each bond and otherwise sufficiently describe the same to identify it as being secured by such mortgage, and thereby elect that such bond or bonds be taxed under this article, and such bond or bonds shall be taxed upon the whole amount thereof notwithstanding the provisions of section two hundred and sixty of this article. A tax shall thereupon, in the case of mortgages other than corporate trust mortgages, be computed, levied and collected upon the amount of the principal debt or obligation represented by said unpaid prior advancements at the time of filing such statement, or, in the case of a corporate trust mortgage, upon the amount of the bond or bonds specified in the statement filed, at the rate prescribed by section two hundred and fifty-three of this article. Said bonds representing prior advancements under corporate trust mortgages and taxed as herein

provided may be presented to the recording officer, whose duty it is to collect said tax, for indorsement and he shall thereupon indorse upon each of said bonds a statement, attested by his signature, of the payment of the tax as provided in this section in respect to bonds representing subsequent advancements, and the record owner of any other mortgage taxed upon prior advancements as herein provided may present said mortgage to the recording officer and thereupon such officer shall note upon the same the filing of the statement and the amount of the tax paid, attested by his signature. In all such cases the recording officer shall note on the margin of the record of such mortgage the filing of such statement and the amount of the tax paid, and, in case of bonds secured by corporate trust mortgages, the serial number of each such bond. The words "bond" and "bonds" as used in this section shall be deemed to embrace all notes or other evidences of indebtedness secured by mortgages taxable under this section. In case of any mortgage taxable under this section, the portion of the indebtedness secured thereby upon which the tax imposed by this section is paid, and such portion only, shall be exempt from taxation under the provisions of section two hundred and fifty-one of this article. Whenever the tax imposed by section two hundred and sixty-four of this article as said section existed prior to May thirteenth, nineteen hundred and seven, has been paid with respect to any mortgage, no additional tax shall ac-

crue on such mortgage under this section as hereby enacted and such mortgage and the debt or obligation secured thereby, shall continue to be entitled to the exemptions and immunities conferred by this article and all of the provisions of this article shall remain applicable to such mortgage. All taxes imposed by or which became due, payable or collectible on or before the thirtieth day of June, nineteen hundred and six, pursuant to chapter seven hundred and twenty-nine of the laws of nineteen hundred and five, and all taxes which under section two hundred and fifty-eight of this chapter became due and payable on the thirtieth day of July, nineteen hundred and six, and all other taxes, if any, which were imposed by chapter seven hundred and twenty-nine of the laws of nineteen hundred and five on any mortgage recorded prior to the first day of July, nineteen hundred and six, in respect to any period ending on or before the first day of July, nineteen hundred and six, shall be imposed, become due, be payable and collectible and shall be paid over and distributed in the same manner, and with the same force and effect as if this article had not been enacted; and for the purpose of collecting, paying over, distributing and enforcing any such taxes, chapter seven hundred and twenty-nine of the laws of nineteen hundred and five shall be deemed to be in force, and the lien for such taxes shall attach and such taxes shall be levied and collected as provided in chapter seven hundred and twenty-nine of

the laws of nineteen hundred and five, anything herein contained to the contrary notwithstanding.

§265. *Tax a lien; exceptions.* The tax in this article imposed shall be deemed and is hereby declared to be a lien upon the mortgage upon which such tax is imposed and upon the debt or obligation secured thereby, except that upon mortgages recorded prior to July first, nineteen hundred and six, such lien shall extend only to that portion thereof represented by the amount advanced subsequently to such date and to the debt or obligation secured by such advancement, and for the purpose of enforcing the payment of the tax in this article imposed, such mortgage and the debt thereby secured shall be deemed to be property within this state notwithstanding that such mortgage may be owned by or be in the possession of a person or corporation outside the state, and a copy thereof duly certified by the recording officer of any county in which such mortgage is recorded shall, for the purpose of enforcing the payment of such tax, be deemed to be, and shall have the same force and effect as the original mortgage and may be sold to satisfy such tax and upon a sale of the whole or any part thereof, shall carry with it and transfer to the purchaser all the rights, interests and obligations of the mortgagee therein named or his assignee or successor in interest in and to such mortgage and the debt secured thereby, or the part thereof to which such lien attaches, together with interest, and costs.

§266. *Enforcement; procedure.* In case the tax imposed by this article is not paid as in this article provided, the tax commission may notify the attorney-general of such failure or refusal to pay and it shall then be the duty of the attorney-general to enforce the payment of such tax, and for that purpose he may maintain an action in the name of the people of the State of New York, in any court of competent jurisdiction, either to sell such mortgage; or, he may maintain an action against the mortgagee or his assignee or successor in interest personally; or, where by stipulations contained in such mortgage it is made the duty of the mortgagor to pay such tax, then against the mortgagor or his successor in interest personally; or, in the case of a trust mortgage against the trust mortgagee, personally; or, he may pursue either, any or all such remedies. All actions instituted by the attorney-general, as herein provided, shall, if the amount involved is fifty dollars or more, be brought in the County of Albany. Where, in any action, a recovery is had there shall be added to the amount of such tax and included in the judgment, interest at the rate of one per centum per month on the amount of such tax, to be computed from the date on which such tax became due and payable, except that in the case of taxable mortgages heretofore recorded and upon which the tax imposed by this article has not been paid, and where, in such case, no penalty is prescribed by law for the non-payment of such tax, interest shall be added at the rate of six per centum per annum.

In any action brought as herein provided, where the judgment provides for the sale of the mortgage, such judgment shall also prescribe the time, place and manner of such sale and of the notice thereof to be given, and, in the discretion of the court, may direct that such sale be made by or under the direction of the comptroller or the recording officer of the county in which such mortgage was first recorded, and all money recovered in such action shall be paid by the attorney-general to the proper recording officer in satisfaction of such tax, and all costs recovered therein shall be paid into the state treasury.

§267. *Idem; where recovery is had against trust mortgagee.*—In every case where recovery is had personally against a trust mortgagee as herein provided, and payment of the amount recovered has been made by such trust mortgagee, or where such trust mortgagee has voluntarily paid such tax, he shall be deemed to have and possess and to have become subrogated to all the rights and interests in and to the tax lien imposed by section two hundred and sixty-five hereof, and may enforce the repayment of any such sum so paid by him with interest at the rate of six per centum per annum and for that purpose may maintain an action in his own name in any court in the state having jurisdiction, against any person, association or corporation liable to pay such tax, or for the sale of such mortgage and the debt secured thereby to which such lien attaches.

APPENDIX C.

Copy of New York Tax Law on Secured Debts, being Article 15 of New York Tax Law, added by Chapter 802 of the Laws of 1911.

APPENDIX C

Copy of New York Tax Law on Secured Debts, being Article 15 of New York Tax Law, added by Chapter 802 of the Laws of 1911.

APPENDIX C.

COPY OF NEW YORK TAX LAW ON SECURED DEBTS BEING ARTICLE 15 OF NEW YORK TAX LAW ADDED BY CHAPTER 802 OF THE LAWS OF 1911.

ARTICLE XV.

TAX ON SECURED DEBTS.

§330. *Definitions.* The words "secured debts," as used in this article, shall include:

(1) Any bond, note or debt secured by mortgage of real property recorded in any state or country other than New York and not recorded in the state of New York;

(2) any and all bonds, notes or written or printed obligations, forming part of a series of similar bonds, notes or obligations, the payment of which is secured by a mortgage or deed of trust of real or personal property, or both, which mortgage or deed of trust is recorded in some place outside of the state of New York and not recorded in the state of New York;

(3) any and all bonds, notes or written or printed obligations, forming part of a series of similar bonds, notes or obligations, which are secured by the deposit of any valuable securities, as collateral security for the payment of such bonds, notes or obligations, under a deed of trust or collateral agreement held by a trustee;

(4) any bonds, debentures or notes, forming part of a series of similar bonds, debentures or notes, which by their terms are not payable within one year from their date of issue and which are not issued for an amount exceeding one thousand dollars for each such bond, debenture or note, and the payment of which is not secured by the deposit or pledge of any collateral security. The term "secured debts" as used in this article shall not include securities held as collateral to secure the payment of bonds taxable under this article or under article eleven of this chapter.

§331. *Payment of tax on secured debt.* Any person may take or send to the office of the comptroller of this state any secured debt or a description of the same, and may pay to the state a tax of one-half per centum on the face value thereof, under such regulations as the comptroller may prescribe, and the comptroller shall thereupon make an indorsement upon said secured debt or shall give a receipt for the tax thereon, describing said secured debt and certifying that the same is exempt from taxation, which indorsement or receipt shall be duly signed and dated by the comptroller or his duly authorized representative. The comptroller shall keep a record of such indorsements and receipts with a description of such secured debt, together with the name and address of the person presenting the same and the date of registration. All secured debts so indorsed or described in such receipt shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of

the state except as provided in sections twenty-four, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine of this chapter, and in articles ten and twelve of this chapter.

§332. *Stamps, how prepared and used.* Adhesive stamps for the purpose of paying the tax provided for by this article shall be prepared by the comptroller, in such form, and of such denominations and in such quantities as he may from time to time prescribe. Upon the payment of the tax provided by this article upon any secured debt the comptroller shall affix stamps of the proper denominations, equal in face value to the amount of tax paid, to the secured debt or to the receipt for the tax, and shall cancel the same by the seal of his office or by such other canceling device as he may prescribe.

§333 *No exemption unless stamps are affixed and canceled.* The payment of the tax upon any secured debt, as provided in this article, shall not exempt such secured debt from taxation, as provided in section three hundred and thirty-one, unless stamps to the proper amount are affixed and canceled, as provided in the preceding section.

§334. *Contracts for dies; New York city office; expenses, how paid.* The state comptroller is hereby directed to make, enter into and execute for and in behalf of the state such contract or contracts for dies, plates and print-

ing necessary for the manufacture of the stamps provided for by this article, and provide such stationery and clerk hire, together with such books and blanks as in his discretion may be necessary for putting into operation the provisions of this article; he shall be the custodian of all stamps, dies, plates or other material or thing furnished by him and used in the manufacture of such state tax stamps. In addition to the receipt of taxes payable as provided in this article at his office in the city of Albany, the comptroller shall maintain an office for the receipt of such taxes in the city of New York. He shall appoint, and may at pleasure remove, such assistants, clerks and other persons as may be necessary to carry out the provisions of this article and shall fix and determine their salaries. All expenses incurred by him and under his direction in carrying out the provisions of this article shall be paid to him by the state treasurer from any moneys appropriated for such purpose.

§325. *Illegal use of stamps; penalty.* Any person who shall willfully remove or cause to be removed, alter or cause to be altered the canceling or defacing marks of any adhesive stamp provided for by this article with intent to use the same, or to cause the use of the same after it shall have been used, or shall knowingly or willfully sell or buy any washed or restored stamp, or offer the same for sale, or give or expose the same to any person for use, or knowingly use the same or prepare the same

with intent for the further use thereof; or shall willfully use any counterfeit stamp or any forged stamp with intent to defraud the state of New York, shall be guilty of a misdemeanor and on conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than six months, or by both such fine and imprisonment, at the discretion of the court.

§336. *No deduction of debts against taxable secured debts.* The owner of any secured debt, on which the tax provided for in this article has not been paid, shall be assessed upon such secured debt in the taxing district in which he resides, upon the fair market value of such secured debt and no deduction for the just debts owing by him shall be allowed against the assessed value of such secured debt, as provided in section twenty-one of this chapter or elsewhere in this chapter or in any other law of this state.

§337. *Application of taxes.* The taxes imposed under this article and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon.

§2. This act shall take effect September first, nineteen hundred and eleven.

APPENDIX D.

Copies of opinions of the Appellate Division of the State of New York for the Third Judicial Department.

APPENDIX D

Copies of opinions of the Appellate Division of the State of New York for the Third Judicial Department.

APPENDIX D.

Copies of opinions of the Appellate Division of the State of New York for the Third Judicial Department in the case of

> The People of the State of New York *ex rel.* Central Union Trust Company of New York, Trustee of the Estate of Marcia Ann Gavit, Relator, vs. James A. Wendell, as Comptroller of the State of New York, Respondent,
> (197 App. Div., p. 131).

COCHRANE, J.:

The estate represented by the relator was the owner of certain real estate mortgages on which the recording tax required by section 253 of the Tax Law had been duly paid. Section 251 of that law provides as follows "All mortgages of real property situated within the State which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the state, counties, cities, towns, villages, school districts and other local subdivisions of the State," except as therein provided which is not here material. The relator contends that the interest on such mortgages may not be considered for the purpose of ascertaining the "net income" constituting the basis of the income tax imposed by section 351 of the Tax Law. The Comptroller has in-

cluded such interest as one of the elements in determining such "net income" of the relator and has assessed the income tax against the relator on the basis thereof. The purpose of this proceeding is to test the propriety of the position taken by the Comptroller.

The action of the Comptroller is clearly within the provisions of the Tax Law (§§ 351, 352, 357, 359, as added by Laws of 1919, Chap. 627), relating to the imposition of income taxes, and known as the Income Tax Law. The principal contention of the relator is that section 251 of the Tax Law (as amd. by Laws of 1916, Chap. 323, and Laws of 1917, Chap. 485), which with correlated sections is in article 11, known as the Mortgage Tax Law, was in effect a contract between the State and mortgage investors that the latter on payment of the recording tax imposed by section 253 of the Tax Law (as amd. by Laws of 1916, Chap. 323) should be exempt from all other taxation in respect to such mortgages and that the provisions of the so-called Income Tax Law requiring the interest on such mortgages to be considered in fixing the net income with respect to which the income tax is imposed is inconsistent with said section 251 and consequently impairs the obligation of the State's contract with such mortgagees. For the purposes of this discussion it may be assumed without so deciding that the purpose of section 251 was to encourage mortgage investments and that it possesses the characteristics of a contract between the State and mortgagees who have made their investments prior to the enactment of

the income tax provisions of the law. It does not follow, however, that the interest earned by such mortgages was within the purview of such contract so as to be exempt from other taxation. It is true that as between the parties to a mortgage the interest thereon is an incident of the principal and like the latter is controlled by the mortgage provisions. But in considering what is exempt from taxation the rule is that such alleged exemption must be "described in clear and unambiguous language, and appear to be undisputably within the intention of the Legislature" (*People ex rel. Westchester Fire Ins. Co. vs. Davenport,* 91 N. Y., 574, 586). In *Yazoo & Mississippi Valley R. Co. vs. Adams* (180 U. S., 1, 22), it was said: "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the Legislature. * * * And while, as we have held in many cases, Legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies." In *Chicago, Burlington & Kansas City R. R. vs. Guffey* (120 U. S., 569, 575), the rule was declared in these words: "It is the settled doctrine of this court that an immunity from taxation by the State will not be recognized unless granted

in terms too plain to be mistaken." In the light of the foregoing rule the purpose of the Legislature in enacting the recording tax provisions of the law must be ascertained. Likewise such purpose can only be intelligently ascertained by reference to conditions then existing. Mortgages were subject to assessment by the local assessors. Only the principal of such mortgages was included in the assessment roll. Interest thereon played no part in the system of taxation then in vogue. Clearly the dominant idea in the mind of the Legislature was to render mortgagees independent of the action, capricious or otherwise of local tax officials. It is true that the State was included in the prohibition against taxing recorded mortgages, but that the controlling purpose was as above indicated is manifested by the detailed enumeration of the subdivisions of the State from the activities of which such mortgagees were rendered immune. "Counties, cities, towns, villages, school districts and other local subdivsions of the State" were each specifically named as being deprived of the right to exercise any of their taxing powers in respect to such mortgagees. The phraseology of the section emphasizes the idea that it was such particular kind of taxation as then existed against which relief was being granted. Otherwise there was no occasion for specifying the various subdivisions of the State. Such idea is further emphasized by the title of said section 251: "Exemption from local taxation." Again, section 253 carefully confines the rate of taxation to the "principal debt or obligation." That is all which in any event was the subject of tax-

ation at the time of that legislation. Interest as such was not taxable. And when in section 251 it was declared that all mortgages *"taxed by this article"* should be exempt the reasonable construction thereof is that it was only the "principal debt or obligation" constituting the basis of taxation thereof as stated in section 253 which was intended to be exempt. Such interpretation is clearly within the rule of strict construction as declared in the authorities above cited. That there is at least a doubt as to whether the taxability of interest was within the legislative mind is, we think, reasonably clear. All doubts and ambiguities, however, must be resolved in favor of the taxing power. We think that sections 251 and 253, construed in the light of conditions existing at the time of their enactment, and with reference to the manifest purpose of their enactment, disclose an intent to deal only with such taxation and such methods of taxation as were then prevalent and have no reference to the income derived from such mortgages. There was no occasion to take into account such income or to legislate in reference thereto for the reason that it was not then taxable. Furthermore, it cannot be assumed that the Leigslature intended to barter away its taxing powers and every mortgagee must have known that by the mere payment of the recording tax he was not rendered immune from all other taxation in the future should the general interest of the community or the public exigencies so require (*People ex rel. Iroquois Door Co. vs. Knapp*, 186 App. Div., 172, 175; affd. 227 N. Y., 592; *People ex rel. Gallatin National*

Bank vs. Commissioners, 67 id., 516; *People ex rel. Cunningham vs. Roper,* 35 id., 629, 635). The possibility of the enactment of an income tax many years in the future did not exist in the minds of the legislators at the time they enacted the recording tax provisions. Those provisions and the exemption created thereby had no reference to an entirely distinct system of taxation at some time in the future such as is created by the income tax provisions. We are not unmindful that it has been held that a tax on income is in reality a tax on the property producing the income (*Pollock vs. Farmers' Loan & Trust Company,* 157 U. S., 581; 158 id., 601; *Hancock vs. Singer Manufacturing Company,* 62 N. J. L., 289, 342; *Opinion of the Justices,* 220 Mass., 613, 623). That might be important in reference to some questions, as for instance if we are considering the legality of a tax on income, there being a constitutional prohibition against such tax on the principal. Our problem here, however, is one of statutory construction and to ascertain the legislative intent, and in a problem of that nature we are not hampered by constitutional restrictions. In our view of sections 251 and 253 of the Tax Law it is as if the Legislature had said, there shall be no other tax on the principal of mortgages except the recording tax, but we reserve the right to impose in the future should circumstances require a tax on the income of such mortgages. If we have properly construed such legislation, the validity of the tax in question necessarily follows.

There is still another view to take of this question. The income tax is not directly at least imposed on any particular income. The recording tax is imposed on the mortgage (§253); the income tax is a tax on the individual. It is "imposed upon every resident of the State" (§351). His income is used only in fixing the measure of such tax. It is the "net income" on which the tax is computed (§351). The "net income" means the "gross income" of the taxpayer less legal deductions (§357) and in determining the "gross income" mortgage interest as well as all other income is included with numerous exceptions specified in section 359. From such "gross income" thus determined are to be subtracted numerous deductions (§360) and also certain exemptions (§362) before the tax is computed. Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual. In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage. That is merely a factor in the determination of the amount of such taxation. We think, therefore, for the reasons stated that the contention of the relator cannot be sustained.

The determination should be confirmed, with fifty dollars costs and disbursements.

All concur, except John M. Kellogg, P. J., dissenting, with an opinion.

JOHN M. KELLOGG, P. J. (dissenting):

The State is bound by its contracts which are based upon an actual and not a speculative con-

sideration (*People ex rel. N. Y. C. & H. R. R. R. Co. vs. Mealey*, 224 N. Y., 187, 197; *First Construction Co. vs. State of New York*, 221 *id.*, 295). Here, in order to induce the taking of real estate mortgages, the Legislature imposed a recording tax by sections 251, 253 and 254 of the Tax Law, and agreed with the relator, who complied with the act, to exempt "all mortgages * * * and the debts and the obligations which they secure, together with the paper writings evidencing the same * * * from other taxation by the State," and the subdivision of the State, except from taxes imposed under certain sections of the statute which we are not interested in. In effect section 253 requires a payment in advance of a sum which is agreed to be in lieu of all future taxes on account of the mortgage, the debt and the obligation secured, together with the writings evidencing the same. Section 254, relating to mortgages made before the act, whether recorded or unrecorded, is a request to the owner to come within the act and obtain the benefits of the exemption. There the consideration of the contract more clearly appears.

The mortgage secured the payment of the interest as well as the principal; in fact the interest was clearly the moving reason for making the loan and taking the mortgage. The relator would have kept its money if it was to be returned without interest; it loaned it to secure the interest. The interest is not, therefore, a mere incident to the mortgage, but is an essential part of it, and is a part of the debt secured.

Where the law gives interest as damages for the breach of a contract, it may be considered an incident to the debt; but where the original contract requires the payment of interest, the agreement to pay the interest is as much a part of the debt and obligation as is the agreement to pay the principal (*Southern Central R. R. Co. vs. Town of Moravia*, 61 Barb., 180, 189; *Fake vs. Eddy*, 15 Wend., 76; *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, 583).

The State income tax is imposed upon net incomes. Interest, to be taxable as income, need not be actually paid. Unpaid interest, which has accrued and is payable, is subject to the tax (Tax Law, §350, subd. 6). The taxpayer must include in his return all interest which is accrued and payable. Subdivision 1 of section 359 speaks of income "received," but subdivision 6 of section 350 provides that the word "received" means "received or accrued." "Accrued" means "due" (*Allen vs. Armstrong*, 58 App. Div., 427; 1 C. J., 733). In *Pollock vs. Farmers' Loan & Trust Co.* (*supra*), it was held, under the old Federal Income Tax Law of 1894 (28 U. S. Stat. at Large, 509, chap. 349; *Id.*, 553, §27 *et seq.*), that income from municipal bonds could not be taxed by the Federal authorities, as they had no right to tax the bonds themselves.

The past due interest upon a mortgage, which by its terms draws interest, forms a part of the net income for taxation. It has not been paid, and the only right to it is that it is payable by the terms of the mortgage, the obligation upon which the tax has been paid; it is a part of the debt secured by

the mortgage, and is exempt. Needless to say that mortgage loans were made under the act, and old mortgage loans were continued, in reliance upon the exemption provision. The State is bound to keep its obligation with the mortgagees and cannot be permitted to change its position.

If there is a fair doubt as to the proper construction of section 359 of the Tax Law, the Court will be solicitous to adopt the construction which makes for validity rather than for invalidity. In construing the statute it will be assumed that the State meant to meet its fair obligations and deal honorably with its citizens and is not seeking to avoid its just obligations. The following cases sustain these views: *People ex rel. Cooper Union vs. Wells* (180 N. Y., 537); *People ex rel. Cooper Union vs. Gass* (190 *id.*, 323); *People ex rel. Roosevelt Hospital vs. Raymond* (194 *id.*, 189). In each case it was claimed that an exemption from taxation in the charter of a corporation was not destroyed by a subsequent general tax law. In the *Wells* case it was held that the charter of the relator exempting it from taxation prevented the Legislature from destroying the exemption. The case was without opinion in the Appellate Division (98 App. Div., 623) and the Court of Appeals, but is explained in *People ex rel. Roosevelt Hospital vs. Raymond* (194 N. Y., 198, 199). In the *Gass* case it was held that the charter exemption could be repealed by virtue of section 1 of article 8 of the Constitution, which permits all general laws and special laws with reference to corporations to be altered from time to time or repealed. The

Roosevelt Hospital case explains the other cases, and considers that a general statute embracing the subject of taxation ordinarily repeals an exemption contained in a special charter, but that where the exemption is a matter of contract, a proposition by the State which has been acted upon by the party claiming the exemption, the presumption is that it is not repealed and that the exemption survives the general statute. It could not be presumed that the Legislature intended to violate the good faith and the agreement of the State, but it is presumed to have intended to keep faith and to observe its contracts by continuing the exemption. The constitutional provision has no application here and the agreed exemption continues.

In my judgment a fair construction of the Tax Law exempts the interest upon mortgages which have paid a recording tax. If this construction is wrong, then the part of the statute attempting to destroy the exemption is unconstitutional. I favor reversal.

Determination confirmed, with fifty dollars costs and disbursements.